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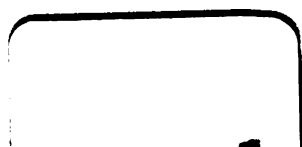
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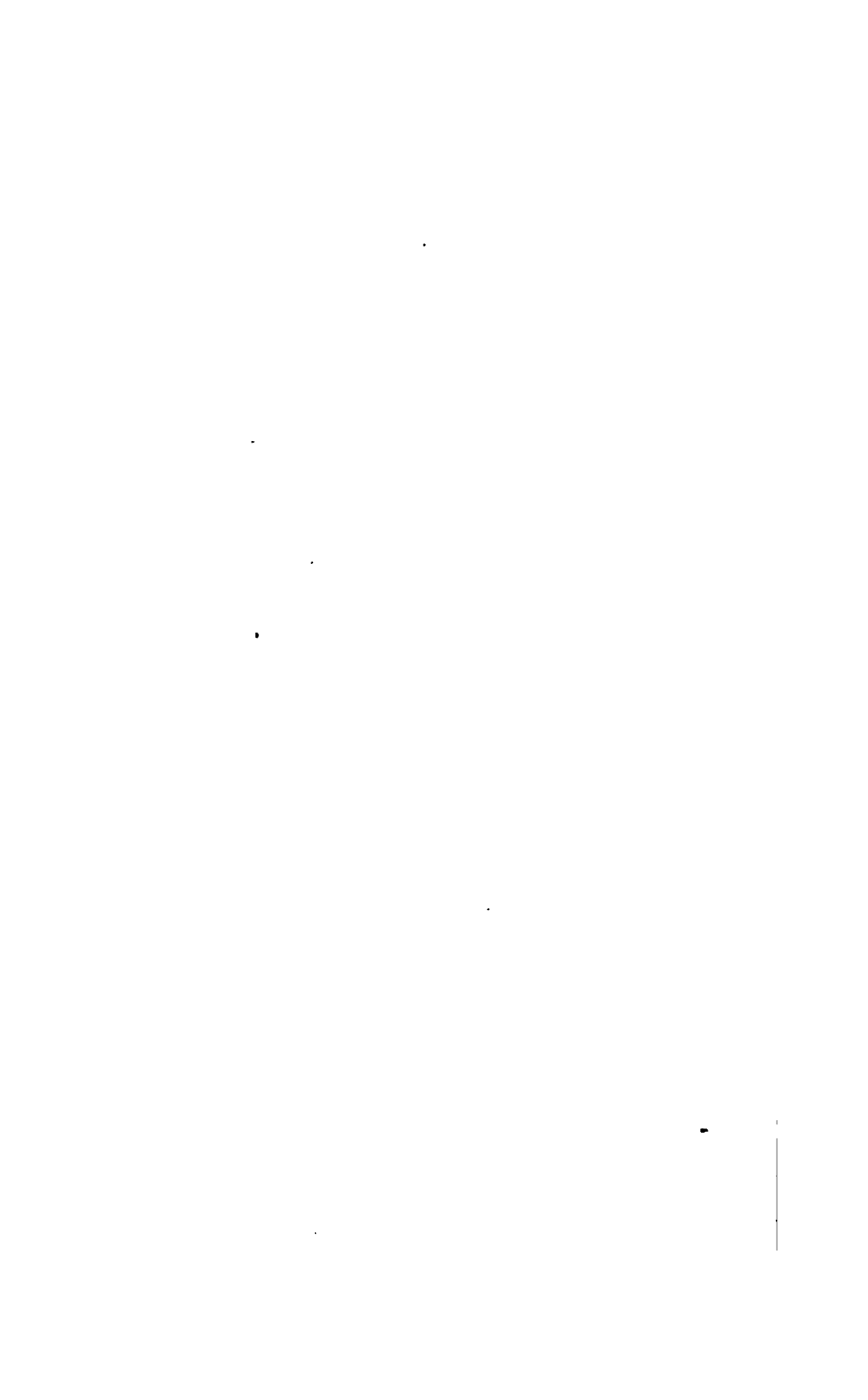
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REPORTS OF CASES

DECIDED IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES, Circuit Court.

FOR THE

(NINTH CIRCUIT)

REPORTED BY

L. S. B. SAWYER,

COUNSELOR AT LAW.

Volume XIII.

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JUDGES

OF THE

U. S. CIRCUIT AND DISTRICT COURTS,

FOR THE NINTH CIRCUIT.

HON. STEPHEN J. FIELD,

Justice of the Supreme Court allotted to the Circuit

HON. LORENZO SAWYER,

Circuit Judge.

DISTRICT JUDGES.

HON. OGDEN HOFFMAN, . Northern Dist. California.
HON. ERSKINE M. ROSS, . Southern Dist. California.
HON. MATTHEW P. DEADY, District of Oregon.
HON. GEORGE M. SABIN, . District of Nevada.

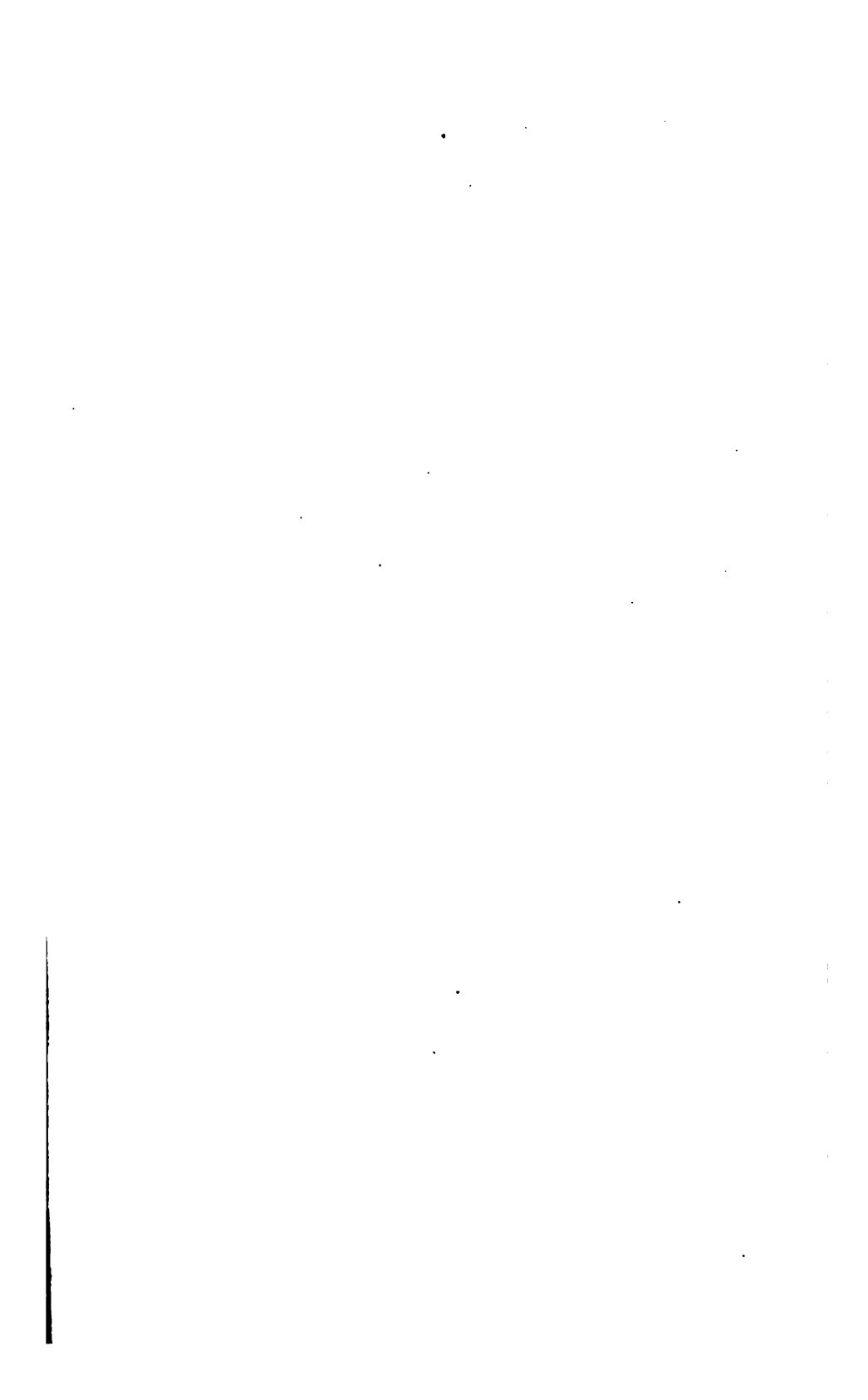


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DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS

OF THE
UNITED STATES, FOR THE NINTH CIRCUIT.

GRAFF ET AL. v. BOESCH ET AL.
CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 8, 1887.

1. PATENTS FOR INVENTIONS — PATENTABILITY — INFRINGEMENT. — On the facts disclosed by the proofs, *held*, that the first claim of letters patent No. 289,571, granted to Carl Schwintzer and William Graff for a lamp burner, shows a patentable invention, and is infringed by the lamp burners sold by respondents.
2. SAME — RIGHTS OF PURCHASER IN THE UNITED STATES FROM MANUFACTURER IN A FOREIGN COUNTRY. — Where an invention was patented in Germany, and subsequently patented in the United States, and under the German patent laws a manufacturer in Germany had a right to practice the invention in Germany, because he had made preparation to do so prior to the issue of the German patent, and for that reason the German patent was of no effect as against him, a purchaser in the United States, purchasing from such manufacturer in Germany, has no right to sell the articles in the course of trade in the United States without license from the owner of the United States patent.

Before SAWYER, Circuit Judge.

In Equity. Bill for infringement of patent.

Messrs. Langhorne & Miller, for complainants.

Messrs. Scrivner & Boone, for respondents.

SAWYER, Circuit Judge. I have carefully examined this case. I am not satisfied that the first claim does not cover a patentable invention. It is a combination. The German court,

which had it under consideration, evidently held it to be a patentable invention. They were also of the opinion that the defendant's instrument is an infringement, and so am I. At all events, I am not satisfied that it is not a patentable invention. The patent itself is *prima facie* evidence on this point which is not satisfactorily overthrown. It is claimed, however, because a man by the name of Hecht has a right to manufacture this invention in Germany, that these articles which the defendant brought here, having been purchased in Germany of him who had a right to manufacture them, the purchaser can lawfully import and sell them here. I do not think that can be done. I do not think the case is at all within the range of any of the cases cited. In fact the first case cited by the defendant is directly the other way. The case that has gone further than any of them is *Adams v. Burke*, 17 Wall. 453, decided by the supreme court, where the patentee holding an American patent has himself sold his right to a particular district, free from any restrictions whatever. It was held that a purchaser from an assignee within the district of an article manufactured in the district was authorized to use the article in any district. But the decision was carefully limited to the use. Nothing was said as to the right to sell the article outside the district.

The case of *McKay v. Wooster*, 2 Sawy. 378, cited from the decisions of this court, does not go so far as seems to be generally supposed, because that is limited, so far as facts and the decision go, to the case where a patentee had sold a limited territory while owning the whole without any limitation or restriction whatever, so that the assignee could make and sell within that territory without limitation or restriction, to be used anywhere, as the patentee could do. A subsequent assignee of another district could not obtain any more than the patentee had at the time of the latter assignment. The patentee could have sold the right to use anywhere in the United States at the time of the first partial assignment. He did not put in the assignment any limitation or restriction as to sales within the district assigned. The next purchaser, who takes another portion of territory, takes subject to that right before assigned, which counsel do not seem to have noticed. The purchase of Cali-

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Opinion of the Court—Sawyer, C. J.

foria in that case was a subsequent purchase of territory with this limitation upon it. The first patent for the invention involved in this case is not an American patent at all. It is a German patent. Hecht, the man who has a right to manufacture in Germany, did not get his right from the patentee. He does not claim under the patent. Under the laws of Germany, when a patent is issued, if another man has made a machine of the kind patented, or is prepared to make it, before the patent issues, the patentee has no right as against him. That was the position of this man, Hecht, who manufactured in Germany the infringing articles now in question, and sold them to the party who imported them from Germany and sold them here. At the time that patent was issued, or applied for, Hecht had already made the patented article, and got machinery ready for making it. That, under the German law, took it out of the patent as to him, so that, although the patentee had a right, in Germany, as against anybody else, he had no right as against Hecht. Hecht did not get his right from the patentee at all. He got it wholly independent of him, so that, even if the same invention is patented in this country, he got no right from the patentee in either country. Hecht simply got such right as the German patent law gave him. If these parties here can buy of anybody else who can lawfully manufacture the machine in Germany without the consent of the patentee, then all that is necessary to do to defeat or avoid an American patent is to step over the line into Mexico or Canada, where the patent does not reach, and manufacture and stock the market in the United States by importation, which can be done without any authority from the patentee. This is an American patent. The complainants claim under it. They have purchased it, and no one else has got any right from the patentee in this country. And I hold that parties who sell in the United States the patented articles manufactured in other countries, where the invention is not protected by a patent, are infringers.

I, therefore, find in favor of the complainants on the first claim of the patent. It will be referred to the master to ascertain the profits and damages.

CHEMICAL NAT. BANK v. KISSANE.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 8, 1887.

1. **LIMITATION OF ACTIONS—ESTOPPEL TO PLEAD STATUTE—EQUITY.**—The fact that a debtor adds a name to his real name, removes to another state, and remains in such state under his assumed name until the cause of action against him on the demand is barred by the statute of limitations, affords no ground, under the statute of limitations of California, for enjoining the debtor from setting up the statute of limitations as a bar to an action at law to recover on the demand.
2. **SAME—IN EQUITY.**—The statute of limitations of California applies to suits in equity as well as actions at law.
3. **SAME.**—The statute of limitations of California provides for every exception to the running of the statute intended to be allowed, and every case wherein the time for the running of the statute is postponed beyond the time prescribed by the general provisions of the act. These exceptions are as available at law as in equity, and the remedy at law being complete, there is no ground for equitable relief.

Before SAWYER, Circuit Judge.

Mr. E. D. Sawyer and *Mr. Burnett*, for complainant.*Messrs. Garber, Thornton & Bishop* and *Mr. T. I. Bergen*, for defendant.

SAWYER, Circuit Judge. This is a bill in equity to restrain the defendant from setting up a plea of the statute of limitations on a demand for money said to have been fraudulently obtained from the Chemical Bank, by Kissane and two other parties, more than thirty years ago—as far back as 1855.

The complainant here files a bill to restrain the defendant from setting up the plea of the statute of limitations, Kissane having been a resident of this state for thirty years. The ground for relief is, that after defendant obtained this money, he went to Nicaragua, enlisted in Walker's army, and changed his name, or rather added to his name. His name being William Kissane, he took on the name of Rogers; so that the name he afterwards went by was William Kissane Rogers, or William K. Rogers, as he signed it. It is alleged in the bill that it was publicly reported, or rumored, that Kissane was killed in Nicaragua; that complainant believed that report, and therefore did not hunt for him. Complainant now says that this change of name

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Opinion of the Court—Sawyer, C. J.

is a fraud upon complainant, and is a good equitable ground for restraining defendant from setting up the statute of limitations in a suit upon the demand. Undoubtedly the old equity doctrine, before the cases were covered by statutes of limitations, was, that in a certain class of cases, a party could be restrained on a bill in equity from setting up the statute of limitations.

On examination of those authorities, it will be found in all of them, I think, that there was some legal obstacle interposed by the party himself, or by the law, which prevented the setting up of the plea. They were not mere matters of concealment of the person, or disguise, or anything of that sort. All of those cases are of the character indicated. Originally courts of equity would restrain the setting up of the statute of limitations in causes of action arising out of fraud, until the statute had run for the prescribed time after the facts constituting the fraud were discovered; because it was impossible to bring a suit, till the party discovered that he had a cause of action. Provisions of this kind were not in the original statutes of limitations; they were adopted from equity practice, where the principle was originally established. So, where an action was brought, a judgment obtained, and through error the party lost his suit, by a reversal of the judgment, and the suit had to be dismissed, and where in the mean time the statute had run against the original demand, courts of equity interfered because plaintiff was diligently pursuing his remedy, but by some mistake in the proceedings, or some error, had failed to maintain his action. He was active in maintaining his rights—in his endeavors to enforce them. But the defendant in such cases by defending interposed a legal obstruction to a recovery. It was thought that he should not, in such case, be cut off from pursuing his remedy in the proper mode. Those, and others analogous to them, present equitable grounds upon which courts of equity would restrain the setting up of the statute of limitations, the cases, although within the letter, being deemed not to be within the spirit and purpose of the statutes of limitations. So, also, the most common case, perhaps, for restraining the setting up of the statute of limitations, is where the defendant has enjoined the prosecution of a suit, until the statute of limitations has barred an action. In this

case, the defendant himself has also interposed a legal obstruction, and courts of equity would not permit him to avail himself of advantages thus gained. He could not sue, because he was restrained in pursuance of law. He therefore should not lose his rights.

Every one of those cases depends upon equitable doctrines, and they have since been carried into the statutes of limitations of California. All of those are laid down in the books. I held in *Norris v. Haggin*, 12 Sawy. 47; 28 Fed. Rep. 282, and I still adhere to that opinion, that our statute provided for every case where the statute of limitations can be made available, and for every case where the commencement of its operation will be postponed, or the time when it shall commence to run be delayed. It embodies certain exceptions to the general operation of its provisions, and these exceptions, so provided for, are all the exceptions intended by the legislature, and these exceptions are adopted from the equity practice. Our statute of limitations applies to courts of equity as well as to courts of law, as is well settled by the supreme court of the state. (See the authorities cited in *Norris v. Haggin*, *supra*.)

The courts of equity in this state, therefore, are no more authorized to interpolate into the statute other exceptions than courts of law. This would be legislation. The same provisions as to limitations, and the same exceptions as to their general operation, or postponing their operation, or fixing the time when, in exceptional cases, they shall begin to run, can be set up and made available in an action at law, as well as in an equity case; and the provisions and exceptions can be set up in equity in the same way as they can be at law. Hence there is no occasion to go into equity on that ground. The statute provides for all cases, and the remedy at law is complete. The statute provides for all cases wherein the party is entitled to avail himself of an exception to the immediate operation of any provision of the statute of limitations, as will be seen by an examination of its various sections. The question of disabilities is provided for in section 352. So, also, when a party dies before the cause of action is barred, its operation is postponed. (Sec. 353.) Here is one: "When a person who is an alien subject, or

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Opinion of the Court—Sawyer, C. J.

citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action." (Sec. 354.)

A suspension of the running of the statute upon a demand already in suit, in which the judgment is reversed, and pending the suit the prescribed time has run, is covered by section 356. The most common case, perhaps, in which a court of equity would interfere, and restrain the setting up of the statute, before the case was provided for by statutes, is provided for in section 356, in the following language: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." There are other provisions. Thus it is clear, that the legislature intended to provide for every case wherein an exception to the immediate operation of the statute is intended, and it covers, perhaps, all cases, where courts of equity would interfere, before the statute, to restrain the setting up of the statute. If it does not, it covers all cases intended to be covered, and the court is not authorized to add others. That would be legislation. And the statute applies equally at law and in equity. All of these cases in a court of equity, where the party would, formerly, be restrained, are cases where there is some legal obstacle, or some equivalent acts in the way of plaintiff's pursuing his remedy.

In this case, there was no legal obstacle in the way at all. It is true the man, in a certain sense, disguised himself by assuming an additional name, and moved into another state; but there is no legal obstacle to instituting a suit. All complainant had to do was to find the defendant. It was well aware of the cause of action. It was his own fault, or misfortune, if it was unable to find its debtor. If defendant had come into this state, and gone into some of its most secluded corners, without adding a name to his own, it is not likely he would have been found, within the time allowed by statute. I apprehend, that no one in that case would have set up the fact, that he could not be found till the action was barred, as an equitable ground for restraining him from availing himself of the statute of limitations. So, if being bald-headed, he should put on a

wig, or cultivate his beard in such a way, or wear false whiskers, or in some other way disguise himself, in addition to moving to another state, or while staying in some secluded spot in the state, where his obligation was incurred, that would be no legal obstacle to bringing a suit. It would be simply throwing a difficulty in the way of finding, or recognizing, the man. So, taking on an additional name is only another element of the same kind of disguise. It interposed no legal impediment to the pursuing of the remedy, provided he should be found. It might make it more troublesome to find him. I think, therefore, it is not a case under our statute, or upon equitable principles established before the statutes, covering the points upon which the party can be restrained from setting up the statute of limitations. The taking on of another name is an act of disguise, and of seclusion, but it interposes no legal impediment. Then, again, the bill, I think, does not allege any diligence in hunting defendant up. (See *Norris v. Haggin*, *supra*.) The bill states that it was rumored, or supposed, that defendant was killed in Nicaragua, and intimates that, perhaps, he caused the rumor to be spread. If complainant believed public rumor, without taking the trouble to verify its truth, and failed to pursue its rights for that reason, that is its misfortune, or its fault. The defendant has lived openly and publicly in one of the most frequented parts of the state for thirty years: It is scarcely possible that he has not met hundreds of people who knew him under the name of Kissane during the last thirty years.

Even imbecility of the creditor is stated by Story not to afford any excuse in equity for not commencing a suit within the time prescribed by the statute of limitations. (Story, Eq. Jur. 1521 *a*; *Norris v. Haggin*, 12 Sawy. 56, 57; 28 Fed. Rep. 282.) Much less should a failure to hunt for a debtor by reason of belief in a public rumor that he is dead excuse neglect, and abrogate the statute.

Then, again, there is a technical ground against maintaining this bill. There is no allegation that complainant has commenced a suit at law, or that defendant has attempted to set up the statute of limitations, or that he has even intended to set it, should a suit be commenced. *Non constat* that he would set it

1887.]

Opinion of the Court—Deady, J.

up. Complainant cannot know that he will do it, until it commences a suit and ascertains. There is no allegation of a threat to set it up. The bill only alleges that complainant believes the statute would be set up. This is insufficient. I do not think that complainant's belief, or fears, without some facts indicating the purpose of defendant, can constitute equitable grounds for relief. But there is no equity in the bill, and the objection is radical, and cannot be obviated by amendment.

The demurrer must be sustained, and the bill dismissed; and it is so ordered.

THE DUNDEE MORTGAGE TRUST INVESTMENT COMPANY v.
J. R. CHARLTON, SHERIFF.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 10, 1887.

1. COUNTY BOARD OF EQUALIZATION—WHO MAY APPEAR BEFORE IT.—Any person who has property listed on the assessment roll of a county for taxation is "interested" in the proceedings of the county board of equalization, and may appear before it and have redress against an unjust and unequal valuation of property on said roll, to his injury, whether the same is caused by an over-valuation of his own property or an under-valuation of that of others.
2. SUIT TO RESTRAIN THE COLLECTION OF A TAX.—A person who is aggrieved by the wrongful action of an assessor in the valuation of his own or others' property for taxation, cannot maintain a suit in equity to enjoin the collection of any portion of the tax resulting from such action, unless he first seeks redress at the hands of the county board of equalization, as provided by statute.

Before DEADY, District Judge.

Mr. John W. Whalley, for the plaintiff.

Mr. W. R. Bilyeu, for the defendants.

DEADY, J. This suit is brought to restrain the county of Linn and the defendant Charlton, its sheriff, from collecting the one half of the taxes levied by the county in 1884 on the mortgages owned by the plaintiff on real property therein, amounting to \$1,172.85.

From the bill it appears that the plaintiff is a foreign corporation, formed under the laws of Great Britain, and is the owner of promissory notes of the nominal value of \$150,348.71, secured

by mortgages on lands in Linn County; that the same were assessed by the assessor of said county in the year 1884, for taxation, as real property, under the act of October 26, 1882, at their nominal value, while all real property not under mortgage was only assessed at from one third to one half its value; that the tax levied on said assessment of the plaintiff's notes and mortgages amounts to \$2,345.90, one half of which is in excess of the taxes levied on property generally of the same value, and is therefore alleged to be illegal.

It also appears that the plaintiff has paid the one half of said taxes, and that the county through its proper officers will, unless restrained by the decree of this court, proceed to make the balance of said tax by the sale of said notes and mortgages.

The answers of the defendants admit the allegations of the bill, except as to the valuation of the real property not under mortgage, and aver that the same was valued for taxation at its true cash value, as required by law.

The evidence in the case is quite voluminous and contradictory. But considering the relation of the witnesses to the subject-matter, and the interest which most of them have in the question involved in the controversy, their several means of knowledge, the character of their testimony, and the difference in the value of lands as appears from the assessment roll and that for which they were sold by the owners, as appears by the county record of conveyances, it is evident that the average valuation of lands in the county not under mortgage did not exceed sixty per centum of their "true cash value," and probably not over fifty per centum thereof, such "value," as defined by statute (2 Or. Laws, 1887, p. 1285), being "the amount such property would sell for at a voluntary sale, made in the ordinary course of business, and not what it would bring at public auction or forced sale." And this discrimination appears to have been the result of a deliberate purpose on the part of the county assessor, and made in accordance with the established practice of his office and the prevailing power of public opinion.

On these facts the plaintiff appears to be entitled to an injunction to restrain the collection of so much of this tax as results from this unlawful discrimination between its mortgages and

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other real property in the valuation of the same for taxation. (*Dundee M. T. I. Co. v. Parrish*, 11 Sawy. 92; *Cummins v. Nat. Bank*, 101 U. S. 153.)

Nor is it material that, at the filing of the bill, the plaintiff had only paid fifty per centum of this tax, instead of sixty. All was paid that was then conceded or appeared to be due. That was sufficient to give the company a standing in court to litigate the question; and the fact that the court has at the end of such litigation found there was sixty per centum due does not affect such standing, or the plaintiff's right to relief against the payment of the remaining forty per centum. (*State Railway Cases*, 92 U. S. 617; *Nat. Bank v. Kemball*, 103 U. S. 733.)

But on the hearing the defendant made the objection that, conceding the error and injustice of the assessor, the remedy of the plaintiff in the first instance was an appeal to the county board of equalization to correct the same; and that unless it appears that it has resorted to this means of redress without avail, it cannot have relief in a court of equity.

By the statute of the state on the subject of assessing property for taxation it is made the duty of the assessor to list all lands in the county subject to taxation, and assess them at their "true cash value," or what they would bring at a voluntary sale under ordinary circumstances, and a mortgage on a land which is a security for a debt is required to be assessed as real property in the county in which the land lies for the nominal value of the debt, unless the land is not worth so much.

When the assessment is completed, the roll is returned to the county clerk, and public notice is given by the assessor that on a day named the board of equalization, consisting of himself, county judge, and clerk, will attend at the office of the latter and publicly examine the assessment roll, and among the other things correct all errors of valuation therein. If property has been valued by the assessor "under or beyond its actual value" this board is authorized to make the proper correction; but it cannot increase the valuation of any person's property without first giving him notice to show cause. It is also declared to be "the duty of any person interested to appear" before said board at said time and place. (2 Or. Laws, 1887, ch. 17.)

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Counsel for the plaintiff insist that it was not bound to appear before the board of equalization, and seek a revision and correction of the assessment in this particular, for the reason, if none other, that it could not be heard and had no standing there to complain of the under-valuation of other people's property. Neither could it complain of the over-valuation of its own considered by itself. The injustice done by the assessor was caused by the fact, not that the plaintiff's property was assessed too high, but that of others was systematically assessed too low.

The constitution of the state (Art. 9, sec. 1) requires that "the legislative assembly shall provide by law for an uniform equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property."

Now this board of equalization is the only provision that the legislature has made for the correction of errors or the equalization of values in the work of the assessor. The presumption is that the legislature has thereby undertaken to comply with the injunction of the constitution, to secure uniform and equal assessment and valuation of property for taxation. And the statute should be so construed, if it reasonably can.

But if the assessor can assess one class of property at its cash value and another at anything less, and the owners of the first class cannot be heard to complain of the result because their property, abstractly speaking, is correctly valued, and the owners of the second will not complain because they are not injured, but the contrary, then the legislature has made no sufficient provision on the subject.

The statute gives any person "interested" a right "to appear" before the board of equalization. The right "to appear" before a tribunal engaged in the transaction of particular business implies the right to be heard thereabout, so far at least as the party is "interested." Now every one who has property on the assessment roll is so far "interested" in seeing that all other property subject to taxation in the county is put on such roll, and is valued thereon relatively, as high as his own, or that his own is valued no higher than others. In the assessment of property, for general taxation, a "just" or equal

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valuation thereof is of more importance than an absolutely "true" one. Therefore, it is no answer to the complaint of a property holder of an unequal assessment or valuation that his property is assessed at its "true cash value." For although that may be true in the abstract, he is entitled to have it valued at its true cash value relatively, or according to the standard of cash value adopted in the valuation of other property, either by lowering the valuation of the one or raising that of the other. The owner of a mortgage on real property given to secure the payment of a debt, which is valued by the assessor at the face of the latter, has cause to complain of an unjust valuation, contrary to the constitution, when an adjoining tract of land, not under mortgage, is valued for taxation at less than the owner would dispose of it at a voluntary sale under ordinary circumstances, and he is "interested" in having the error corrected; and in my judgment he has a right to appear before and be heard by the board of equalization for that purpose.

But the plaintiff having neglected to avail itself of this means of redress cannot maintain a suit for relief in this court. It is no excuse for this neglect, that the board of equalization as well as the assessor were committed to the rule of taxing mortgages, which were generally owned by non-residents, at their face or cash value, and the property in lands, which generally belonged to residents of the county, at much less than such value. Notwithstanding this, it was the duty of the plaintiff, if dissatisfied with the assessment, to pursue the mode prescribed by the statute, relating to assessments, for its correction, when if it failed, it might have taken the matter before the circuit court of the state on a writ of review (*Rhea v. Umatilla Co.* 2 Or. 298), or brought this suit to restrain the county from collecting the illegal portion of the tax.

There must be a decree dismissing the bill and for the defendants for costs.

LEROY v. DOE.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 17, 1887.

1. **LIMITATIONS OF ACTIONS—SAN FRANCISCO LAND TITLES.**—The act of Congress of July 1, 1864 (13 Stats. 333, sec. 5), granting lands within the charter limits of 1851 to San Francisco, for certain purposes, vested a perfect title without a patent, and, as to titles derived under the act, the statute of limitations began to run from the time of its passage.

Before SAWYER, Circuit Judge.

Action to recover lands.

The lands are situated within the limits of the pueblo of San Francisco, and within the corporate limits of the city under the charter of April 15, 1851. In August, 1853, E. C. Marshall filed what is called a pre-emption claim, embracing the lands, took possession and fenced it. He afterwards conveyed undivided portions to various parties. The numerous defendants and their grantors claiming under Marshall took possession at an early date, and maintained it, claiming title, adversely to plaintiff, up to the time of the commencement of the suit. There were numerous conveyances, and several partitions made between the defendants. The plaintiff also claims an undivided interest, by conveyances made under Marshall, but neither the plaintiff, nor any of his grantees, appear to have been in actual possession since the conveyances from Marshall in 1854. On June 20, 1855, the common council of the city of San Francisco passed an ordinance, since known as the "Van Ness Ordinance," whereby the city relinquished and granted all its right and title to lands within its corporate limits, "to the parties in actual possession thereof, by themselves or tenants, on or before the first day of January, 1855," with certain specified exceptions, not including the lands in question; "provided such possession has been continued up to the time of the introduction of this ordinance in the common council; or if interrupted by an intruder, or trespasser, has been, or may be, recovered by legal process." Section 3 provided that the patent issued, or any grant made, by the United States to the city, "shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns,

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mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued, or made directly to them, individually, and by name." (Stats. 1858, p. 53.) This ordinance was ratified and confirmed by an act of the legislature of the state of California, approved March 11, 1858. (Stats. 1858, p. 52.) On July 1, 1864, Congress passed an act, section 5 of which provides as follows, to wit:—

"That all the right and title of the United States to lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the state of California, on the fifteenth day of April, 1851, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said state, approved on the eleventh of March, 1858, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' etc." (13 Stats. 333, sec. 5.)

The title of the city of San Francisco was confirmed to the pueblo lands, including the lands in controversy, by a decree of the United States circuit court, on May 18, 1865; and by an act of Congress approved March 8, 1866, pending an appeal from the decree of the circuit court (14 Stats. 4), the title of the city was finally granted and confirmed to the city, in trust for those in actual possession, at the time specified, to all the lands embraced in said decree of the circuit court of May 18, 1865; but no patent was issued to the city till after the commencement of this suit, which was on January 28, 1876. The question arising under the statute of limitations was as to when the statute of limitations began to run, as against the parties out of possession, claiming title under the city, through the various proceedings herein stated. The plaintiff insisted that the title from the United States did not become final and perfect until the issue of the patent to the city under the decree of confirmation, and said confirmatory act of 1866; while the defendants maintained that the title became perfect to the lands covered by the act without a patent by the legislative grant in the said act of 1864, and that the statute began to run as to the title derived

from the United States under said act, through the city of San Francisco, from the date of that act.

Mr. Wm. Leviston, for plaintiff.

Messrs. Wilson & Wilson, for defendants.

SAWYER, Circuit Judge. I have gone over this case very carefully. As to all that part of the land described in the complaint lying outside of the line of the Marshall claim, the plaintiff failed to show any title, and that point I decided against him at the trial. As to the other parts, those detached portions lying within the line of the Marshall claim, I am satisfied that the statute of limitations began to run from the date of the act of Congress of July 1, 1864, granting the lands to the city of San Francisco for the purposes stated. (13 Stats. 333, sec. 5.) That was a positive statutory grant. It passed the title as perfectly as a patent would. A patent adds nothing to the title. It only affords a convenient muniment of title. I have ruled before, and so has Justice FIELD, that the statute of limitations begins to run as to the lands embraced in this act from the date of its passage. I am satisfied that there was an adverse possession, from the date of the act, such as would set the statute running even against the party who claims to be a tenant in common. The other parties did not recognize plaintiff as a tenant in common. Their claim was so notorious and manifest against all the world that Leroy must have known it. They paid the taxes and had various dealings with each other in regard to the lands, recognizing each other's interests, but not the claim of Leroy. They fenced it up, and rented it in parts to tenants, and constantly exercised dominion over it. There were several partitions and deeds of partition. Their numerous acts were open and notorious, and wholly in disregard of any claim of Leroy, if he made any pretensions to title. Their acts were of such a character that he could not fail to have been put on notice. I am satisfied that under the later decisions, even against a tenant in common, an adverse possession is shown. There can be no possible question as to all other claimants. The action is barred by the statute of limitations, and there must be a judgment and

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finding for the defendants on that ground. I put the decision on the ground that the plaintiff is barred by the statute of limitations, without considering the other points as to title. The statute began to run in 1864; the suit was commenced in 1876. They were ten years in such adverse possession. The action was barred even under the further act of Congress of March 8, 1866. (14 Stats. 4.)

Let there be findings and judgment for defendants.

MEYERS EL AL. v. BUSBY.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 17, 1887.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DEFENSES.—The fourth and fifth defenses to suits for infringements of patents, authorized to be made by section 4920, Revised Statutes, are separate and independent defenses; and each requires its appropriate notice or answer in order to let in testimony to establish the defense.

Before SAWYER, Circuit Judge.

Action in equity to enjoin the infringement of letters patent No. 141,580, to the complainant Louis Meyers, issued on the fifth day of August, A. D. 1873, for "a glove fastener." The claim is as follows:—

"I claim as my invention, and desire to secure by letters patent, the glove fastener, consisting of a cord, B, which is fastened with both ends to one flap of the glove, and drawn through holes in the other flap, to operate in combination with the button or holder, E, as set forth."

The respondent is a glove manufacturer at San Francisco, and practiced the invention under a license from complainant, and paid the royalties therein provided; but at its termination he declined to renew it. He continued, however, to practice the invention against the will of complainants, and thereupon this suit was commenced to enjoin him. A preliminary injunction was granted at the commencement of the suit.

The answer of defendant presents three matters of defense. It alleges:—

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“*First*, that the complainant Louis Meyers was not the first inventor or discoverer of any material or substantial part of the device for fastening gloves, covered by the letters patent mentioned in complainants’ bill of complainant; *second*, that the said device for fastening gloves so covered by said letters patent had been in public use or on sale in this country for more than two years before the application of said Louis Meyers for a patent therefor; *third*, that the defendant has not infringed the patent of the complainants.”

The provisions of section 4920 of the Revised Statutes, under which the first and second of the defenses are pleaded, are as follows:—

“(4) That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented. (5) That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. If any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him, with costs.”

Mr. J. H. Miller, for complainant.

Messrs. Gray & Havens, for defendants.

SAWYER, Circuit Judge. In this case there is really only one defense that is available, and on which any testimony was taken, or could be taken under the answer, and that is, as to the prior public use for two years before the application for the patent. The fourth defense under the statute, that it is not new, and the invention has been made before, is a distinct defense from the fifth, and the defendants have given no sufficient notice of any testimony—and no testimony other than that applicable to the defense of two years’ prior use, on the question of prior invention; no notice of place of residence, or name of any party who invented it before, or knew of it before it was invented by the patentee in this case. As to the other defense, no two years’ public prior use has been shown, unless it be in the state of New York. I do not think the defendants have made out the defense, that it was in use in New York state two years, or at any time

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before the application for a patent. It is true, that one man at one shop, another one at another, testified that they had seen it; that the patented article, a similar glove, had been made and sold at the manufactory where they worked in 1869, or about that time, but they are contradicted by other witnesses, by one of the owners himself, of one shop, who said he carried it on, and was perfectly cognizant of what was done there, during the time referred to, and also by his glove-cutter. They both testified, positively, that the invention was not made in that shop, or sold or used by them. They knew the facts, and were the very persons pointed out by the witness who testified for defendant in the case, that he had conversed with upon the subject, and in conjunction with them investigated the mode of making. The witness is thoroughly contradicted. It seems to be one of those cases where somebody, years afterwards, in looking back to find an anticipation, imagines that he remembers some such case. I do not think the two years' prior use, or any prior use at all, is satisfactorily shown. On the contrary, I think it is clearly contradicted. It is not merely the negative testimony of some one who had never seen the thing. It is the positive evidence of parties, one the owner and the other the cutter, who must have seen the invention, had it been manufactured by them in their shop, and there sold. The same is true in the other case in New York. The testimony of defendant's witness is contradicted by several witnesses who could not be mistaken. In both cases at Chicago of parties, one of whom said he brought a pair of similar gloves from Norway, and wore them in Chicago in 1872, and another who also brought a pair to this country in 1874, the evidence is not satisfactory. If either is correct, the case was not in time, as the application for the patent was made July 16, 1873. I very much doubt the reliability of the testimony. There was but a single pair brought some fifteen years ago from Norway. It is scarcely probable that a pair of gloves would be kept or remembered so long, there being nothing in particular to attract attention to the matter. It would be a very unsafe incident upon which to overthrow a patent, at this late date, on the ground relied upon. At all events, it was not two years, or one year before the making of the application

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for a patent in this case, which was made on the 16th of June, 1873. One of these pairs of gloves was brought to this country in 1874 or 1876, long after the application, and the other was alleged to have been brought in 1872, within the period of two years, even if the testimony be true; but I greatly doubt if that glove was brought from Norway in 1872.

There must be a decree for the complainant, and a reference to the master to ascertain the net profits and the damages, and it is so ordered.

THE UNITED STATES *v.* R. J. HARRISON.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 21, 1887.

CUSTOM DUTIES—INDICTMENT FOR FALSE SWEARING—EXISTENCE OF OTHER BILLS OF LADING.—The fact that at the time a person entered merchandise at the custom-house there were in existence, to his knowledge, several copies of the bills of lading and invoices presented by him, does not make his sworn statement, as required by the Revised Statutes, United States, section 2841, that he does not know of, or believe in the existence of any invoices or bills of lading other than those produced by him, a false oath, as the other invoices or bills of lading intended by the statute are bills of lading or invoices different from those presented, and not merely the copies thereof which by commercial usage or statute are required to be procured.

Charge to the jury by HOFFMAN, Judge.

Gentlemen of the jury: This defendant is indicted for false swearing. The facts of the case are not disputed. It is admitted that he took, when entering certain merchandise at the custom-house, the owner's oath, in the form prescribed by law. This form requires him to swear that: "I do not know or believe in the existence of any invoice or bill of lading *other* than those now produced by me, and that they are in the state in which I actually received them." (Rev. Stats. sec. 2841.)

When he took the oath there were in existence two other copies or counterparts of this bill of lading presented by him, the master of this vessel having, according to immemorial custom, affirmed to three bills of lading, "all of this tenor and date, one of which being accomplished the rest to stand void." This fact appeared on the face of the bill of lading presented.

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With respect to the invoice, the law required it to be made in quadruplicate, each copy to be certified by the United States consul at the port of shipment. Two of these copies are to be furnished to the party producing the invoice—one is to be retained by the consul, and the other is to be by him transmitted to the surveyor or collector at the port of delivery.

The only question in this case is, did the fact that these copies or counterparts of the documents presented by the defendant were in existence (a fact, of course, well known to him and the deputy collector, who administered the oath), make his sworn statement that he did not know or believe in the existence of any invoice or bill of lading “other” than those produced by him a false oath. It is plain to me that it did not. If it did, no entry of imported merchandise can be made at the custom-house by either owner or consignee without false swearing. For bills of lading, like bills of exchange, are always signed in several parts. And the *law* requires that invoices shall be certified by the consul in quadruplicate.

It is evident that the other invoices or bills of lading, of the existence of which the party making the entry is obliged to swear he has no knowledge or belief, are bills of lading or invoices different from those presented by them, and not merely copies or counterparts of those instruments which by universal commercial usage or by express statute are required to be procured.

By contemplation of law all the bills of lading or invoices constitute but one instrument in several parts, just as a lease by indenture wherein the lessor and lessee each retains a counterpart is but one deed.

It is absurd to suppose that Congress, when prescribing the form of oath to be taken by owners or consignees of imported merchandise, intended to make entry of the goods impossible, without false swearing.

I direct you to render a verdict of not guilty.

JAMES H. FISK v. DANIEL V. B. HENARIE, ELEANOR
MARTIN, ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 26, 1887.

1. **TRUTH OF AFFIDAVIT OF PREJUDICE OR LOCAL INFLUENCE.**—The provision in section 2 of the act of 1887 (24 Stats. 563), authorizing the court to examine into the truth of an affidavit for removal of a case from a state court, on account of prejudice or local influence, applies only to cases removed before the passage of said act on the application of the plaintiff; and otherwise than this, such affidavit being not a matter of jurisdiction, but only a condition imposed on the party seeking the removal, it cannot be questioned or contradicted; nor is it necessary that the affiant should state the grounds of his belief.
2. **WHO ENTITLED TO REMOVE ON ACCOUNT OF PREJUDICE UNDER THE ACT OF 1887.**—Subsection 3 of section 639 of the Revised Statutes, as amended by section 2 of the act of 1887, gives the right to remove a suit "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," to "any" defendant, being such citizen of another state, on account of prejudice or local influence, without reference to the citizenship of other persons who may be parties thereto.
3. **JUDICIAL POWER OF THE UNITED STATES—CONTRVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.**—The judicial power of the United States extends to "controversies" between citizens of different states, which include a "case" in which such controversy exists without reference to the citizenship of the other parties therein, and Congress may confer jurisdiction of such controversy, including the case in which it is involved, on the circuit courts, by removal or otherwise.
4. **TIME OF APPLICATION FOR REMOVAL.**—An application for the removal of a case from a state court, if made while the case is pending for trial, is made "before the trial thereof," within the intent of the removal acts, although there may have been any number of mistrials, or trials in which the verdict was set aside or the jury disagreed.

Before DEADY, District Judge.

Mr. George H. Williams, for the plaintiff.

Mr. James K. Kelly and *Mr. John M. Gearin*, for the defendants.

DEADY, J. This action was removed to this court from the state circuit court for the county of Multnomah, on the petition of the defendants, Daniel V. B. Henarie and Eleanor Martin, and James M. Donahue, Annie Donahue, and Mary Ellen von Schroeder, the executors of the last will and testament of Peter Donahue, deceased, filed July 30, 1887, together with their bond, in form and effect as required by law, and the affidavit of said Henarie and Eleanor Martin, to the effect that they, and each of

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them, have reason to and do believe "that from prejudice and local influence" the affiants and said executors "will not be able to obtain justice in said state court, or in any other state court to which said defendants under the laws of the state of Oregon have the right to remove the same on account of such prejudice and local influence." The plaintiff now moves to remand the case to the state court for substantially the reasons following: (1) The application for removal was not made in time, or before the trial in the state court. (2) The affidavit does not state the facts showing the existence of "local prejudice or influence." (3) The removal papers were not served on the plaintiff. (4) The petition and accompanying papers do not show a case for removal.

The motion concludes with a denial of the existence of the alleged "prejudice and local influence," and asks the court to examine into the truth of the affidavit asserting the same and the grounds thereof, and to that end the plaintiff offers to read the affidavits of sundry persons who state that they do not believe in the existence of such prejudice or local influence.

It appears from the record that this action was commenced in Wasco County on November 30, 1883, against Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, to recover a commission of ten per centum, amounting to sixty thousand dollars, on the alleged sale of a tract of land belonging to said parties, known as the Dalles military road grant, containing about six hundred thousand acres, and situate in the counties of Wasco, Grant, and Baker, in Oregon.

The first three of the defendants were then residents and citizens of California, and the latter three of Oregon. Service of the summons was had on the Oregon defendants, and they appeared and answered. Thereafter, on February 2, 1884, publication of the summons was ordered in the case of the California defendants, who, on August 21, 1884, appeared and answered. The answers of the defendants controvert the allegations on which the plaintiff bases his demand, and contests his right to recover anything from them, or either of them, on any sale of said lands.

On September 1, 1884, the plaintiff replied to the answers, and on the 10th of the same month, on the application of the defendants, the place of trial was changed to Multnomah County, it appearing that none of the parties lived in Wasco County, and that the Oregon defendants as well as the plaintiff lived in Multnomah County.

Afterwards the case was tried with a jury in the circuit court for said county, who, on April 15, 1885, found a verdict, under the direction of the court, for the defendants, on which there was a judgment for costs in their favor; which judgment was, on January 11, 1886, reversed by the supreme court and a new trial ordered, that resulted, on May 21, 1886, in a verdict for the plaintiff for the sum of sixty thousand dollars.

On May 18th the death of the defendant Peter Donahue was suggested, and his executors, James M. Donahue, Annie Donahue, and Mary Ellen Schroeder, substituted as defendants. Afterward the case was heard on the motion of plaintiff for judgment, and the motions of the defendants for a new trial and a judgment, notwithstanding the verdict, and on June the 30th, the first motion was denied and the latter allowed, on the ground that the complaint did not state facts sufficient to constitute a cause of action; and thereupon judgment was entered for costs in favor of the defendants; which judgment was, on October the 20th, reversed by the supreme court and the case remanded for further proceedings according to law.

On December the 18th the circuit court allowed the motion for a new trial and set aside the verdict, from which order the plaintiff appealed to the supreme court, which appeal was, on April 18, 1887, dismissed, and thereafter the case was again submitted to a jury, who being unable to agree, were on July the 15th discharged without finding a verdict.

The act of March 2, 1867 (14 Stats. 558), gave right of removal of a suit from a state court to a national one, "in which there is a *controversy* between a citizen of the state in which the suit is brought and a citizen of another state," on the affidavit of the latter, "whether he be plaintiff or defendant"; that he has reason to believe and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state

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court, provided he files a petition for such removal “at any time before the final hearing or trial of the suit.”

Section 639 of the Revised Statutes contains a compilation of the statutes on the subject of removals passed prior thereto. Subsection 3 thereof took the place of the act of 1867. In its compilation the word “controversy” was dropped and the right of removal limited to a “suit between a citizen of the state in which it is brought and a citizen of another state;” and the petition and affidavit were required to be filed at any time “before the trial or final hearing of the suit.”

By the act of March 3, 1875 (18 Stats. 470), section 639 of the Revised Statutes was repealed except subsection 3 thereof. The last two clauses of the section regulating the manner of removal were also held to remain in force for the purpose of removals under said subsection, the same not being provided for in the act of 1875. (*Baltimore & Ohio Ry. v. Bates*, 119 U. S. 467.)

The act of March 3, 1887 (24 Stats. 552), purports to be amendatory of that of 1875, “and for other purposes.”

Considering the importance of the subject and the high character of the body that enacted it, to say the least, it is a very unskillful and slovenly piece of legislation. It contains (secs. 5 and 6) a general repealing clause “of all laws and parts of laws in conflict” with itself, and several special ones and sundry saving clauses, in which no mention is made of section 639 of the Revised Statutes. But section 2 of the act contains subsection 3 of said section in a modified form, and so far repeals the latter by implication.

It reads as follows: “And where a suit is now pending or may be hereafter brought in any state court, in which there is a *controversy* between a citizen of the state in which the suit is brought and a citizen of another state, *any* defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time *before the trial thereof*, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of

the state, have the right, on account of such prejudice or local influence, to remove said cause; *provided*, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

Then follows an independent temporary provision, intended to apply to suits pending in the circuit courts, which had then been removed from the state courts under subsection 3 of section 639 of the Revised Statutes, "on the affidavit of any party *plaintiff*" therein, on account of prejudice or local influence, which authorizes the circuit court at any time before trial, on the application of the other party, to "examine into the truth of said affidavit and the grounds thereof," and to remand the case unless the statement appears to be true.

Thus it appears that by the act of 1887 the pendency of a suit in which there is a "controversy" between citizens of different states is again made the ground of removal, as in the act of 1876, in cases of prejudice or local influence, while the right to have such removal is confined to the "defendant." The clause concerning an examination into the truth of the affidavit for removal, when made by the "plaintiff," has no application to a removal had under the act, and which did not take place before the passage of the same, under subsection 3 of section 639 of the Revised Statutes.

In the case of a removal under this subsection, the party seeking it is required to make an affidavit to the effect that he believes he cannot obtain justice in the state court, on account of prejudice or local influence. The act of 1887, however, only provides that such fact "shall be made to appear" to the circuit court, but as to when or how it shall be made to appear, or how such removal may be effected, it is silent. This class of cases is expressly excepted from the operation of section 3 of the act prescribing the mode of removal thereunder, generally. It follows that so much of section 639 of the Revised Statutes as relates

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to the method of removal on account of prejudice or local influence, and the proof thereof, is not in conflict with the act of 1887, and is therefore still in force and applicable to such removal. And thus, in the mode provided by statute, it appears to the court, from the affidavits of the defendants, Henarie and Eleanor Martin, that from prejudice and local influence, the defendants will not be able to obtain justice in the state courts. It is sufficient that they have made oath that they so believe, without setting forth the facts or circumstances on which such belief is founded. (*Meadow V. M. Co. v. Dodds*, 7 Nev. 147. See, also, *Bowen v. Chase*, 7 Blatchf. 255.)

It was competent for Congress to have authorized the removal of the case on the diverse citizenship of the parties alone. But it has seen proper to require in addition the oath of the applicant for removal, that he *believes* he cannot obtain justice in the state tribunal on account of prejudice or local influence. Any fact, the existence of which is made a condition precedent to the removal of a case, and which is also necessary to the jurisdiction of the circuit court, may be controverted by the party against whom such removal is had. But the proper mode of doing this is not by affidavits, but by a dilatory plea in the nature of a plea to the jurisdiction on which the question may be submitted to a jury for determination. (*McDonald v. Salem Flour Mills Co.* 31 Fed. Rep. 578; *Coal v. Blatchford*, 11 Wall. 177.)

But the affidavit of the defendants concerning their belief as to their ability to obtain justice in the state tribunals is not a jurisdictional matter, but only a condition precedent to their right of removal, the same as the oath to a demurrer, required by the equity rule 34 as a condition precedent to filing the same, "that it is not interposed for delay." And in my judgment, when such affidavit is made and filed in the manner and terms prescribed by the statute, the condition is performed, and the truth of the matter is not open to question. No case has been found in which it has been allowed or even attempted; and the action of Congress in providing specially in the act of 1887 for examining into the truth of the affidavit in pending cases, where the removal was had on the affidavit of the "plaintiff," is a legislative construction of the act to the same effect.

In a suit between a citizen of the state in which it is brought and a citizen of another state, subsection 3 of section 639 of the Revised Statutes gave the latter, whether he was plaintiff or defendant, the right of removal. The courts, following the narrow construction given to the same language in sections 11 and 12 of the judiciary act of 1789 (*Beardsley v. Loney*, 4 Wash. 286; *Smith v. Rines*, 2 Sum. 338; *Hubbard v. Northern Railway Company*, 3 Blatchf. 84; *Wood v. Davis*, 18 How. 467; *Coal v. Blatchford*, 11 Wall. 172), held that although the designation of the party, plaintiff or defendant, is in the singular number, it was intended to embrace all the persons who were on one side of the controversy, so that if either of two or more parties plaintiff were citizens of the same state with either of two or more parties defendant, the case could not be removed.

As the law then stood before the passage of the act of 1887, this action could not have been removed to this court by either of the defendants, for some of them are citizens of Oregon—the same state as the plaintiff.

But by the act of 1887 the foundation of the right of removal is not “the mere pendency of a suit in a state court between a citizen of the state in which it is brought and a citizen of another state.” It is enough if there is a suit pending in such court, “in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state.” And while the right to remove such suit is in effect thereby denied to the plaintiff, it is not given to the defendant collectively, but to “any” one of them who “is a citizen of another state.”

These material changes in the language of the statute can only be considered, under the circumstances, as showing an intention on the part of Congress to restore the act of 1867 in this respect, as it was before the compilation of the Revised Statutes. It is no longer necessary that the “suit” should be between persons of diverse citizenship. It is sufficient if there is a “controversy” involved in the suit between two such persons—the one being a citizen of the state in which it is brought—whatever may be the citizenship of the other plaintiffs or defendants. Nor can the right of removal thus given to “any” defendant having

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the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include "all" the defendants, and so be denied to "any," unless "all" have such citizenship.

In support of the contrary view of the matter it is urged that the act of 1887 is a piece of what may be called "confederate" legislation, in which there is a manifest purpose to restrain and limit the authority of the national courts, and therefore it is not likely that it was intended to enlarge their jurisdiction in this class of cases. That such appears to be the general character of the act may be admitted. But it appears to be a piece of patch-work, in which probably a number of hands were engaged, with doubtless somewhat diverse purposes. But be this as it may, no court would be warranted, on the strength of such a suggestion or circumstance, in construing the phrase "any" defendant to mean "all" the defendants, be they more or less.

Admitting this to be the proper construction of the statute, counsel for the plaintiff insists that it is unconstitutional.

The question whether Congress has the power to provide for the removal of a case from a state to a national court, in which some of the necessary parties defendant are citizens of the same state with the parties plaintiff, or some of them, has not been directly decided by the supreme court. It was argued before that tribunal with marked ability and research in the case of the *Sewing Machine Companies*, 18 Wall. 553. But as the court held that Congress had not then undertaken to confer such power on the circuit courts, it was not decided.

Mr. Dillon (Removal of Causes, sec. 27) is clear that the judicial power of the United States includes such cases, and therefore Congress may confer jurisdiction over them on the circuit courts, by the process of removal or otherwise. In *Lockhart v. Horn*, 1 Woods, 628, Mr. Justice Bradley, in considering a case brought in the circuit court under section 11 of the judiciary act of 1789, said: "Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. It certainly would not under the

constitution. The case would still be a controversy between citizens of different states."

The constitution (Art. 3, sec. 2) provides: "The judicial power shall extend to all cases in law and equity, arising under the constitution of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; *between citizens of different states*; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects."

The change in the language of this section from the use of the term "cases" to "controversies" is apparently deliberate and premeditated, and in the case of an instrument so carefully prepared and considered as the constitution of the United States, cannot be regarded as fortuitous or without special significance. In my judgment, it was intended by the use of the terms "cases" and "controversies" to distinguish between an ordinary action or suit, which may include many parties, plaintiff or defendant, and involve the examination and consideration of more than one item of dispute or controversy, and so much or such part of such proceeding as may only constitute a controversy between two or more of said parties, who are citizens of different states. There may be a controversy in a case which is less than the whole of it. Both the act of 1875 and that of 1887 (sec. 2) make express provision for the removal of a case—the whole case—in which there is a separate controversy between citizens of different states.

A controversy between citizens of different states is none the less such a controversy because they are not the only parties to it. A controversy in the contemplation of the constitution is but a dispute concerning rights or wrongs cognizable by law, and which may therefore be the subject of an action or involved therein. To confine the operation of the words "controversies between citizens of different states" to cases wherein the contro-

versy is *exclusively* between citizens of different states is to interpolate a word into the grant of judicial power which materially limits and restrains its operation. As well might it be claimed that the judicial power extends "to all cases affecting ambassadors, other public ministers, and consuls," *and them only*. Then a suit might be brought in a state court against or affecting a foreign minister and Congress would be powerless to authorize its removal, if the plaintiff took the precaution, as he doubtless would, to make some third person a co-defendant. What the effect of such a state of things would be on the relations of the United States with other governments may be easily imagined.

The extension of the judicial power over a controversy between citizens of different states is not to be rendered nugatory by the accidental circumstance that it forms a part of or is involved in a suit between citizens of the same state. On the contrary, the jurisdiction in such cases must be held to include all the incidents which inhere in or attach to the controversy. "Congress has power to make all laws which shall be necessary and proper to carry into execution" the grant of judicial power (Const. U. S. Art. 1, sec. 8), and thus make it equal to the great and beneficent purpose for which it was intended. And in so doing may, in my judgment, confer jurisdiction on the circuit courts of a case involving a controversy, whether separable or not, between citizens of different states, by removal or otherwise; and this, although some of the parties plaintiff and defendant in the suit are citizens of the same state.

The grant of judicial power is one of the most effective means by which the framers of the constitution undertook to "form a more perfect union" between the people of the several states, and to protect them in their interstate intercourse and business from the danger of injustice growing out of state prejudice and local influence.

Hamilton, in the *Federalist* (No. 80), in discussing this subject says: "In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental

a provision against all evasion or subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

The mere fact that there are parties defendant in this case who are citizens of the same state with the plaintiff ought not to weigh against this conclusion. For so far as they are concerned, it ought not to be a matter of any moment in which tribunal the case is tried. For as was said by Mr. Justice Miller, in *Trust Co. v. Macquillan*, 3 Dill. 381: "The object in each case is to secure an impartial tribunal, and the federal courts are not courts for non-residents more than for residents."

But to compel non-residents to litigate a controversy with a resident in a court of his state, because other residents of such state are, either from policy or necessity, joined with him, as defendants, is to compel him to submit to the judgment of a presumably partial tribunal.

And if it was doubtful how this question ought to be decided, it would be proper to rule against the plaintiff. The act of 1887 allows a party moving to remand a cause the right to take the question to the supreme court, but denies it to his adversary.

Was the application to remove the case made in time? It will assist in the examination of the decisions on this question, to group together the language of the various acts on the subject.

Under the act of 1866 (14 Stats. 356) the application for removal was required to be made "before the trial or final hearing." In the act of 1867 the language was changed to "final hearing or trial." Section 639 of the Revised Statutes, which contains a compilation of these two acts, went back to the language of the act of 1866—"before the trial or final hearing of the suit." The act of 1875 required the application to be made "before or at the term at which said cause could be first tried and before the trial thereof." This cause was removed under subsection 3 of section 639, which requires the application to be made "before the trial or final hearing of the suit."

The following are the principal cases arising under these acts on the question of the time of removal:—

Dart v. McKinney, 9 Blatchf. 359, was a case of removal under the act of 1866. A judgment was given in the state court on the report of a referee against the defendants, which was reversed and a new trial granted, whereupon one of the defendants removed the cause; and on a motion to remand, it was held that the act gave the right of removal “at any time before the trial or final hearing of the cause,” and not at any time before a trial or final hearing of the cause.”

Insurance Co. v. Dunn, 19 Wall. 214, was removed under the act of 1867. The case was first tried in a court of the state of Ohio where there was a verdict against the company. The law of the state gave the latter a right to a new trial on giving bond to abide and perform the judgment of the court, which it did, and then removed the case to the circuit court.

In the progress of the same, it was taken to the supreme court on the question of whether the removal was taken in time, where it was decided in the affirmative. It was held that the adjective “final” applied to “trial” as well as “hearing,” it being understood before the former, and some weight was given to this circumstance. The conclusion of the court was this: “It was intended to permit the removal at any time before a hearing or trial final in the cause as it stood when the application for the transfer was made. (See, also, *Stevenson v. Williams*, 19 Wall. 575.)

In *Vannever v. Bryant*, 21 Wall. 41, there was an application for removal under the act of 1867. The case was this: A trial and verdict was had in the state court. The defendants moved for a new trial, and pending this motion, the non-resident defendants applied for a removal, which was refused, and on this ruling the case went to the supreme court. The ruling was affirmed on the authority of the *Sewing Machine Cases*, 18 Wall. 553. In delivering the opinion of the court, the chief justice said that the application was also properly refused because the case was not then pending for trial, and added: “After one trial the right to a second must be perfected before a demand for the transfer can be properly made. Every trial of a cause is final until, in some form, it has been vacated.”

Fifkins v. Sweetzer, 102 U. S. 177, was removed under the act of 1866 and afterwards remanded to the state court. From the order remanding the case, an appeal was taken to the supreme court, where the same was affirmed.

This was a suit for an account of rents and profits in which there was a decree in the common pleas dismissing the bill. On an appeal to the supreme court of the state this decree was reversed, the bill re-instated, and the common pleas instructed to refer the case to a master to take an account, for the purpose of making "a final decree in the premises according to equity." Two years after the reference, but before any report was filed, the defendant applied to have the case removed to the circuit court.

The supreme court held that the hearing in the state supreme court was a final one, and that nothing remained to be done but to continue the same "until the necessary accounts could be taken and the details of a final decree settled," and therefore the application was too late. In the course of the opinion, Mr. Justice Miller said: The hearing of the case was taken up by the supreme court on the appeal from the common pleas. "If on the appeal, the decree below had been reversed and the cause sent back for a rehearing, then the final hearing for the purposes of the statute now under consideration would not have begun until the court below had again entered upon the determination of the cause."

Alley v. Knott, 111 U. S. 472, was commenced in a state court of New York, and removed on the petition of Alley, one of the defendants, under the act of 1875, to the circuit court, where a motion to remand was allowed. From this ruling an appeal was taken to the supreme court, where the decision of the circuit court was affirmed on the ground that the application for the removal came too late.

The case was this: Alley and other defendants demurred to the complaint in the state court because it did not state facts sufficient to constitute a cause of action, which demurrers were overruled, with leave to the defendants to withdraw their demurrers and answer within a time prescribed, which was done, and on the day following the petition for removal was filed.

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The question argued before and decided by the court is that the trial of an issue of law, such as arises on a demurrer to a complaint for the cause-specified, is "a trial of the action within the meaning of the act of 1875." In the course of his opinion the chief justice remarked that "the state court, before entering a final judgment on the demurrer, granted a new trial with leave to amend the pleadings;" and then said, *arguendo*: "The situation of the case at this time, for the purpose of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after verdict. *We can hardly believe it would be claimed that a removal could be had in the last case, and in our opinion, it cannot in the first.*"

Baltimore & Ohio Ry. v. Bates, 119 U. S. 464, was an action brought in a court of common pleas in Ohio against the railway company. A general demurrer to the petition was sustained by the court and judgment given for the defendant. Afterwards this judgment was reversed by the district court and the case remanded to the common pleas for further proceedings. There the defendant filed a petition for removal under subsection 3 of section 639 of the Revised Statutes, on the ground of prejudice and local influence, and offered security, such as is prescribed by said section, rather than the act of 1875. For this reason the petition was denied and the case went up the long ladder of appeals, with varying fortune, until it reached the supreme court of the state, where the refusal to allow the removal was affirmed. From there the case was taken to the supreme court, where the judgment of the state court was reversed.

The argument of counsel for Bates appears to have been principally devoted to the sufficiency of the security, and the court held that it was properly given under section 639 of the Revised Statutes; but the question of whether the petition was filed in time was also presented and decided. The chief justice disposed of it as a matter scarcely open to argument in these words: "This petition was filed after a new trial had actually been granted, and while the cause was pending in the trial court for that purpose. It was, therefore, *in time*, and no objection is made to its form."

This is the latest case in the supreme court on this question to which my attention has been attracted. It expressly decides that under subsection 3 of section 639 of the Revised Statutes, that while a cause is pending for trial in the state court, a petition for its removal is in time, without reference to the number of trials or mistrials that may have been had in it before.

The suggestion of the learned chief justice to the contrary, in *Alley v. Nott*, *supra*, on which the plaintiff seems to rely, must yield to this direct decision of the court announced by himself.

There is no other authority that gives any countenance to the proposition that the phrase, "before *the* trial," as used in any of these removal acts, means any proceeding other than that which results in a verdict or judgment, subsisting and in force when the application is made. Where the word "trial" is qualified by the word "final," as in the act of 1867, this conclusion is inevitable. But even in the acts of 1866 and 1875 and section 639 of the Revised Statutes, where the phrase used is simply "before the trial," the language fairly construed means, as Mr. Justice Blatchford said, in *Dart v. McKinney*, *supra*, "the trial of the case, and not a trial of it." In the nature of things *the* trial of the case is not any one, but the final one—the one that stands as a thing accomplished in the case.

Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; and where a verdict is set aside because it ought not to stand, the result is the same. The proceeding has miscarried and the consequence is not a trial but a mistrial.

And in the case of a removal for prejudice or local influence there is a good reason for giving the non-resident party a right to make the application after a mistrial, for, as was said by Mr. Justice Miller, in *Hess v. Reynolds*, 13 Wall. 80, "the hostile local influence may not become known or developed at an earlier stage of the proceeding."

In Spear's Law of the Federal Judiciary, 468, after an examination of the cases on the subject the author says, that whenever a verdict is set aside or the jury disagree, the weight of authority

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is that the case is restored to the status it had before any trial took place, and adds: "The theory on which this view rests is that the first trial, being wholly vacated, or resulting in a disagreement of the jury, was a nullity, and hence the case stands, as to the right of removal, just as it would have stood if no such trial had been had."

It does not appear that the resident defendants desire this case remanded as to them or at all. It would be so much additional expense and trouble to the plaintiff to try it in two parts in different courts.

The motion to remand is denied.

THE UNITED STATES v. HENRY C. OWEN ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 7, 1887.

1. CONSPIRACIES TO DEFRAUD THE UNITED STATES.—Section 5440 of the Revised Statutes is not limited in its operation to conspiracies to defraud the United States of its "revenue," but applies to all conspiracies to deprive the United States of any property or dues by means of misrepresentation or concealment of material facts.
2. *IDEM*—LIMITATION ON PROSECUTION FOR.—The crime defined in section 5440 of the Revised Statutes is composed of the conspiracy and an act done in pursuance thereof, and as soon as the one is formed and the other committed, the crime is consummated, and the statute of limitations begins to run against a prosecution therefor; and in three years thereafter the bar is complete.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the United States.

Mr. H. Y. Thompson and *Mr. Rufus Mallory*, for the defendants.

DEADY, J. The defendants, Henry C. Owen, William H. Barnhart, and Rollin V. Ankenny, are accused by the grand jury of this district of the crime of conspiring together to defraud the United States out of sundry portions of the public lands in the district of Oregon contrary to section 5440 of the Revised Statutes.

The indictment was found on April 12, 1887, and it is alleged

therein that prior to July 1, 1881, the defendant Owen had from time to time filed with the proper state board, applications for the purchase of swamp and overflowed lands therein described, as soon as the same, or any portion thereof, should be certified to the state of Oregon under the acts of Congress and the regulations of the department of the interior on the subject; that between August 1, 1880, and January 15, 1882, the defendant Ankenny was a special agent of the general land office, charged with the duty of inspecting, in the field, the swamp and overflowed lands claimed by the state of Oregon under said acts and regulations, and of reporting the result, under oath, to the commissioner of the general land office; that on July 1, 1881, said Owen, Ankenny, and the defendant Barnhart, did agree and conspire together to defraud the United States government of sundry parcels of public lands in Oregon, amounting to 86,665 acres, and to that end said Ankenny, as said special agent, was to report as swamp and overflowed lands, to which the state of Oregon was entitled, large tracts of the public land, including the lands last aforesaid, which were and are not swamp and overflowed, and endeavor to procure the issue of patents therefor to said state; and said Owen was to procure certificates of purchase from the state for said lands; and said Barnhart was to assist said Owen, by preparing applications for the purchase of said lands from the state, and by producing false preliminary proofs as to the character of said lands and thereby secure their withdrawal from entry; and that said defendants, and each of them, would use any means available for such purpose, and endeavor to negotiate the sale of said lands.

That afterward, on December 26, 1881, said Ankenny, in pursuance of said unlawful agreement and conspiracy, did make oath to a series of eighteen affidavits, wherein he stated that all the lands described therein, to wit, 97,560 acres, were swamp and overflowed within the meaning of the act of Congress of March 12, 1860, on that subject, and on which the secretary of the interior on April 16, 1882, certified the same to the state of Oregon as swamp and overflowed lands, the list thereof being entitled, "List number 5 of the Lakeview series of swamp lands," 33,000 acres of which lands were not swamp or over-

flowed lands within the meaning of said act, and did not accrue to the state thereunder, all of which was well known to said Ankenny when he made said affidavits.

It is also alleged in the indictment that later on other acts were done by the defendants, or some of them, in pursuance of the conspiracy, namely:—

1. On December 23, 1881, Owen, with the knowledge of Barnhart, made an agreement with Ankenny and James H. Fisk, to sell a large portion of the lands which Ankenny was then about to report, and did, on December 26th, report, by means of the affidavits aforesaid, as swamp and overflowed.

2. The defendants, between the date of said conspiracy and the finding of the indictment, endeavored, at divers times, to secure the issue of patents for said lands from the United States to the state.

3. On August 24, 1881, September 6, October 9 and 16, November 5, 1883, and December 22, 1884, Owen caused to be filed with said board six specific descriptions of land, containing in the aggregate 621,527 acres, and six applications to purchase the same from the state as swamp or overflowed, well knowing that a large portion thereof was not swamp or overflowed, but public lands of the United States; and on October 9 and November 14, 1883, and March 10, 1885, received certificates of purchase for said lands from the state.

4. On October 31, 1883, Barnhart procured himself to be appointed notary public for Oregon.

5. On September 25, 1884, Barnhart forged three writings purporting to be the joint affidavits of D. M. McMenamy and I. L. Poujade, and on October 8th of the same year, one other writing, and on October 9th two other writings, purporting to be the joint affidavits of C. C. Loftus and D. R. Jones, all of which appear to have been subscribed and sworn to before him, as notary, and are to the effect that the lands described in the lists annexed thereto, amounting to 155,600 acres, are swamp or overflowed, the larger portion of which were on March 12, 1860, and ever since have been dry lands of the United States, and not unfit for cultivation by reason of being swamp or overflowed, which writings were, before December 11, 1884, by Owen

delivered to the governor of the state as proof of the facts therein stated, and by the latter transmitted to the surveyor-general of the United States for Oregon, for a like purpose, as said Barnhart and Owen intended and expected they would be.

The defendant Ankenny resides out of the state, and has not been arrested. The defendants Owen and Barnhart demur to the indictment, for that it was not found within the time prescribed by law, and that the facts stated therein do not constitute a crime according to the laws of the United States.

Section 5440 of the Revised Statutes, on which this indictment is founded, reads as follows: "If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

The crime defined by this act is *sui generis*. It consists of two elements, a conspiracy and an act done to effect or accomplish it. The purpose of the conspiracy must be either to commit a crime defined by any law of the United States or to defraud the same. To defraud "the United States in any manner or for any purpose" is a very comprehensive expression, and includes every conspiracy to deprive the United States, by the misrepresentation or concealment of material facts, of any kind of property, or whatever may be legally due it on account of taxes, duties, imports, excises, or the like.

For the demurrer it is argued that section 5440 applies only to a conspiracy to defraud the revenue of the United States. The reason given is that the section being taken from section 30 of the act of March 2, 1867 (14 Stats. 484) entitled, "An act to amend existing laws relating to internal revenue, and for other purposes," the words "to defraud" must be limited to the subject-matter of the act—the internal revenue.

The subject of the act is not limited by its title to revenue of any kind, but expressly includes "other purposes" or subjects. The language of the section gives no evidence that it was the

intention of Congress to limit its operation to frauds upon revenue. Taken in its natural sense the language includes a conspiracy to commit "any" crime against the United States or to defraud it in any manner; and there is nothing in the circumstances of the case which ought to prevent it from having effect accordingly.

As found in the Revised Statutes, there are some verbal changes in the section which only emphasize the general purpose and character of the statute. It is a wholesome and much needed act; and it is difficult to assign any reason compatible with the public good or the protection of the public property or dues, why any conspiracy to commit a fraud thereon or thereabout should be excluded from its operation.

The limitation on the prosecution of the crime described in this indictment is found in section 1044 of the Revised Statutes, which provides that the indictment must be found within three years next after the same "shall have been committed"; while section 1045 thereof declares that the limitation shall not extend to the case of "any person fleeing from justice."

In *United States v. Cook*, 17 Wall. 168, the supreme court decided that the defense of the bar of this statute of limitations cannot be made by a demurrer to the indictment, although it should appear on the face thereof that the period within which the action should have been commenced had passed before the finding of the indictment, for it may turn out on the trial that the defendant is within the proviso, concerning a fugitive from justice.

This decision is founded on a well-known rule of pleading where the statute defining a crime contains an exception or proviso. It would be much more convenient, however, if the prosecution was required to allege in the indictment that the defendant was a fugitive from justice, in cases where that fact is relied on to take the case out of the statute. (*People v. Miller*, 12 Cal. 291; *People v. Montejo*, 38 Cal. 38.)

In this case, it being well understood that the defendants joining in the demurrer were never fugitives from justice, the district attorney, at the suggestion of the court, and to avoid the trouble and expense of a useless trial with a jury, in case the

court should be of the opinion that the action was barred by lapse of time, has filed a paper in which he admits, for the purpose of this demurrer, that the defendants joining therein were not fugitives from justice.

Assuming this to be a fact of record I proceed to dispose of the question, is this action barred by lapse of time?

The general rule is, that the statute begins to run from the commission or consummation of the crime. (Whart. Crim. P. & P. sec. 321.)

When was this crime committed? The conspiracy was formed on July 1, 1881, and the first act done by any of the conspirators in pursuance thereof was the making of the alleged false affidavits by Ankenny on December 26, 1881, in relation to the character of the land mentioned therein. The crime was then consummated. The two elements of which it is composed—the conspiracy and the act—were accomplished and the crime committed. On December 27, 1881, more than five years prior to the institution of this prosecution, an indictment might have been found against the defendants for this crime. This being so, the limitation on the right to institute a prosecution therefor began to run at the same time, and became a bar thereto on that day, in 1884.

In support of the prosecution it is contended that the crime was not completed until the commission of the last acts done in pursuance of the conspiracy; and that as the filing of the false description by Owen on December 22, 1884, and the making and using the alleged forged affidavits by Barnhart in September and October of the same year, each took place within the three years immediately preceding the finding of the indictment, the prosecution is not barred. In this respect it is likened to or said to be a continuous crime. No authority is cited for the proposition, and on general principles I think it cannot be maintained.

An instantaneous crime, such as arson or killing, is consummated when the act is completed. A continuous crime, such as carrying concealed weapons, endures after the period of consummation. In the former case the statute of limitations begins to run with the consummation, while in the latter it only begins

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Opinion of the Court—Deady, J

with the cessation of the criminal conduct or act; but even then it is a bar to a prosecution for any act or part of the continuous crime which occurred three years prior to such time.

As has been said, this crime consists not in a continuous series of acts, constituting what may be called a habit, but of two distinct things only—a conspiracy, and an act done in pursuance thereof, at any time thereafter.

But admitting this is a continuous crime the demurrer must be sustained on this point. That being the case, the prosecution of the defendants for any act committed three years before the finding of the indictment is barred by lapse of time, and those alleged to have been committed within three years of such finding are not sufficient to constitute the crime defined by the statute. The very foundation of the crime—the conspiracy—is shut out, and without this circumstance, the offense in question is not charged in the indictment. However, this is an instantaneous crime, composed of the conspiracy and the first act done to affect the object thereof, at whatever distance of time therefrom. When the conspiracy is formed the crime is begun and when the act is committed it is consummated. An indictment will then lie against the criminal, and the limitation on the right of the government to prosecute him begins to run, and in three years the bar is complete.

This conclusion does not deny the liability of any of these defendants for any act committed by him within three years, in furtherance of said conspiracy, when the same amounts to a crime. Indeed, Barnhart now stands accused in this court, in three indictments, found under section 5418 of the Revised Statutes, on account of the affidavits alleged herein, to have been forged by him in furtherance of this conspiracy.

The demurrer must be sustained, and it is so ordered.

ANNA THORBURN v. JOHN C. DOSCHER AND ANNA
DOSCHER.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 21, 1887.

1. ESTATE IN DEFENDANT MUST BE PLEADED. — In an action to recover the possession of real property the defense of ownership by the defendant or another must be specially pleaded.
2. DOWER IN CASE OF A NON-RESIDENT WOMAN. — A woman who is not a resident of the state is not entitled to dower in any lands therein of which her husband did not die seised.
3. DOWER, VALUE OF— WHEN ESTIMATED. — In estimating the value of a widow's dower in land aliened by the husband in his lifetime, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon.

Before DEADY, District Judge.

Mr. John W. Whalley and *Mr. James J. Kelley*, for the plaintiff.

Mr. Seneca Smith, for the defendants.

DEADY, J. This action is brought by the plaintiff, a citizen of Arkansas, against the defendants, citizens of Oregon, to recover dower in a tract of land included in the William Blackistone donation, lying on the west bank of the Wallamet River, just north of Portland, and valued at fifty thousand dollars.

It is alleged in the complaint that on December 24, 1865, and prior thereto, Thomas Thorburn was seised of an estate of inheritance in the premises, and that at and during such time the plaintiff was the lawful wife of said Thorburn, and so lived with him until his death, at Prescott, Arkansas, on October 20, 1886; that the plaintiff's right to dower in said premises has not been aliened, and that she is entitled to the undivided one third thereof during her natural life, the present value of which is sixteen thousand dollars.

The answer of the defendant, besides sundry denials, contains four defenses, called therein "further and separate answers."

The plaintiff demurs to the first, third, and fourth of these defenses, because the facts stated therein do not constitute a defense, and moves to make the second one more definite and certain.

The first defense consists of an allegation, that the defendant Anna Doscher is the owner in fee-simple of the premises, and that her co-defendant is her husband.

At common law this defense could have been given in evidence under the general issue of "not guilty." But the Code of Civil Procedure, section 316, provides, "that in an action to recover the possession of real property, the defendant shall not be allowed to give in evidence any estate in himself or another in the property . . . unless the same be pleaded in his answer." That Anna Doscher has an estate in fee in the premises is a defense to this action, and the demurrer thereto is not well taken.

The second defense is, that Thomas Thorburn purchased the premises at a sale on an execution against the property of William Blackistone and John C. Doscher, and received from the sheriff a deed therefor, in trust for the use and benefit of Anna Doscher, and thereafter in pursuance of said trust conveyed his interest in the premises "through" Joseph N. Dolph to said John C. Doscher.

Without stopping to consider the legality of this defense, it is enough to say that the facts and circumstances constituting it are stated sufficiently definite and certain.

The third defense is that on December 24, 1865, Thomas Thorburn conveyed his interest in the donation of William Blackistone to Joseph N. Dolph, and never thereafter owned or was seised of any part thereof; and that the plaintiff has never been a resident of this state.

The fourth defense is that at the time of the sale to Dolph, as in the third defense mentioned, the premises were not worth over two hundred dollars.

By the law of this state since May 1, 1854, a widow is entitled to dower in "all the lands whereof her husband was seised of an estate of inheritance at any time during marriage." (2 Or. Laws, sec. 2954.) But if the husband aliens such lands and they "shall have been *enhanced* in value after the alienation," the same "shall be estimated in setting forth the widow's dower according to their value at the time they were so aliened." (2 Or. Laws, sec. 2960.)

“Any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state, of which her husband died seised, and the same may be assigned to her or recovered by her, as if she and her deceased husband had been residents within the state at the time of his death. (2 Or. Laws, sec. 2974.)

The third defense is based on section 2974.

The object of this section is not to give a non-resident widow the right to dower. That was already done by section 2954, which gives the right generally and without qualification, as to alienation by the husband or the residence of the parties. Although the provision is affirmative in form, it has a negative operation. Therefore it must be construed as if it read: “No woman residing out of the state shall be entitled to dower of the lands of her husband, lying in this state, of which he did not die seised.” By a necessary implication the section denies to a non-resident woman the right to dower of lands of which her husband was not seised at the time of his death.

Cases may arise in which the time when the woman was non-resident, with reference to the act of alienation by her husband or even his death, may be material in the construction of this statute. But in this case it appears that the woman never was a resident of the state, and therefore no such question can arise.

It rests with the legislature to say, what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may, for the security of titles and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent and ostensibly as a single man.

This very case appears to be a good illustration of the wisdom of the provision. Thorburn was probably a transient person. His wife was unknown; and probably the fact that he had one was never even suggested. To subject persons buying property of him under such circumstances to a claim of dower in after years

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Opinion of the Court—Dedy, J.

might well be thought inexpedient, if not unjust, and therefore the legislature has denied it.

In *Bennett v. Harms*, 51 Wis. 251; *Pratt v. Pratt*, 14 Mich. 191; and *Legare v. Semple*, 32 Mich. 438, this question arose under a similar statute, and it was held that the widow was not entitled to dower.

The fourth defense is made under section 2960. To begin with, it may be admitted that the word "enhanced," taken in an unqualified sense, is equivalent to "increased," and comprehends any increase of value however caused or arising. But under the circumstances it ought to be construed to include only the value caused by the improvements put upon the land by the tenant, or those under whom he claims, and not that which arises fortuitously or from what may be called natural causes.

I know that at common law the value at the time of alienation was the basis on which the value of dower was estimated. (4 Kent, 65.) But it was always an unjust rule, and founded on special reasons that have no force at this time or in this country, where it has been ably criticised and questioned.

A buys a piece of wild land, such as this was in 1865, of a known married man, and omits to obtain the wife's relinquishment of dower. When the husband dies and the widow's right of dower becomes a vested interest in one third of the land for her natural life, the same has increased in value many times, without either the labor or capital of the purchaser. On what consideration of public policy or natural justice should she be deprived of her share of this increase in value for the benefit of one who gave nothing for it, and deliberately took the chances on her husband surviving her? None has been suggested nor can there be any. Sitting in this court, if the case was to turn on the decision of this question, I might not feel justified on the authorities in sustaining the demurrer to this defense. But if I were sitting in the supreme court of the state I would do so without hesitation.

To provide that a woman shall have, at the death of her husband, dower in all the lands of which he was seised of an estate of inheritance during the marriage, and then declare that in case the husband aliened the same during his life that she shall

Points-decided.

[November,

not have the benefit of the intermediate rise in value of the property, is a legal "juggle," that may fitly be characterized as keeping the word of promise to the ear and breaking it to the hope.

Since writing the above, I have been fortunate enough to come across *Powell v. Manuf. Co.* 3 Mason, 347, in which Mr. Justice Story, with his usual research and wealth of learning, maintains that at common law a woman was dowable of the lands aliened by her husband during marriage, according to their value at the time of the assignment, less the value of improvements placed thereon by the purchaser or the increase directly consequent on such improvements; citing with marked approbation the opinion of Mr. Chief Justice Tilghman, in *Thompson v. Monow*, 5 Serg. & R. 289, in which the same doctrine is maintained. In conclusion he says:—

"This doctrine appears to me to stand upon solid principles and the general analogies of the law. If the land has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains the loss. Her title is consummate by her husband's death, and in the language of Lord Coke, that 'title is to the quantity of land, viz., one just third part.'"

The motion is denied and the demurrer overruled.

THE UNITED STATES v. MEYER BRANSTEEN ET AL.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

NOVEMBER 25, 1887.

PUBLIC LANDS—UNLAWFUL ENCLOSURES—RAILROAD GRANT.—Act of Congress of February 25, 1885, provides that all enclosures of public lands entered by any person or corporation without claim or color of title to said lands acquired in good faith shall be unlawful. Defendant, as licensee of the Southern Pacific Railroad Company, had enclosed certain lands of the land grant of the company. The lands had, on filing of the plat of the proposed road by the company, been withdrawn from settlement by the United States, though they had not been earned yet by the company. *Held*, that such enclosures of lands did not fall within those prohibited by the act of Congress.

Before HOFFMAN, District Judge.

Mr. John T. Carey, United States Attorney.

Messrs. Eisner & Frank, for the plaintiff.

Mr. Joseph D. Redding, of counsel.

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Opinion of the Court—Hoffman, J.

HOFFMAN, J. This action is brought under the act of February 25, 1885, entitled "An act to prevent unlawful occupancy of public lands."

The first section is as follows: "All enclosures of public lands in any state or territory of the United States heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the enclosure the person, party, association, or corporation making or controlling the enclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto, by or under any claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, creation, construction, or control of any such enclosure is hereby forbidden; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state, or in any of the territories of the United States, without claim, color of title, or asserted right as above specified as to enclosure, is likewise declared unlawful and hereby prohibited."

The second section empowers the court before which the suit is brought, in case the enclosure shall be found unlawful, to make the proper order or decree for the destruction of the enclosure in a summary way, unless the enclosure shall be removed within five days after the order of the court.

The evidence in this case discloses that the defendants have erected a continuous fence on lands owned by them, or on odd numbered sections of land within the limits of the grant to the Southern Pacific Railroad Company by the act of June 27, 1866, of which company they are licensees.

This fence surrounds and encloses a large tract of land in the center of which is an inconsiderable acreage of public land. But roadways are provided, and the fence furnished with gates which are kept unlocked, and which afford access to the public land within the enclosure.

The evidence further shows that on January 3, 1867, the railroad company, in compliance with the provisions of the act of

1866, filed in the office of the commissioner of the land office a plat thereof, in which the line of the road was designated.

By the sixth section of the act the odd sections of land granted by the act, after the general route of the railroad shall be fixed, are declared "not to be liable to sale, entry, or pre-emption before or after they are surveyed, except by the said company, as provided in the act."

The question to be decided is whether this continuous fence constructed as above described has been built and maintained in violation of the act of 1885, and should be removed by order of the court. I do not understand it to be contended on the part of the United States that the act was intended to prohibit the erection of fences upon their own lands by the owners thereof, whenever, by connecting with other fences built on public lands, they form part of a continuous line of fencing and serve to complete an enclosure of public lands. But it is urged that the title to the reserved or odd sections upon which fences have been erected by the license or authority of the railroad company is in the United States until the railroad is constructed and accepted by the government, and that until the lands have been earned by the railroad company the odd sections must be regarded as public land and their enclosure within the prohibition of the act of 1885.

The defendants, on the other hand, contend that the act of Congress granting lands to aid in the construction of the railroad operated as a grant *in presenti* of certain sections of land to be afterwards located; that when so located by the filing in the land office of a map designating the route of the proposed railroad as prescribed by law, the location became certain, and the title of the company attached to the granted sections, as of the date of the approval of the act; that the provisions of the act imposing certain conditions on the company do not affect the creation or vesting of the estate granted by the act; that they are merely conditions subsequent, which render the estate liable to be defeated for breach of such conditions, and that upon such breach Congress alone has power to declare or take advantage of the forfeiture. These views are maintained in a very elaborate opinion by the supreme court of Montana in *N. P. R. R. Co. v. Majors*, 2 West. Coast Rep. 23.

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Opinion of the Court—Hoffman, J.

There are also some general expressions in the opinion of the supreme court in *Buttz v. N. P. R. R. Co.* 119 U. S. 55, from which the same conclusions might be drawn. On the other hand, it has been held by Mr. J. DEADY, in two judgments marked by his accustomed vigor and clearness, that the odd numbered sections granted by Congress in aid of railroads are set apart and devoted to the construction of the roads; but that they are not granted *in presenti* to the corporations. And that the act is in effect an agreement or provision that the same shall be conveyed absolutely to the corporation when and as fast as any twenty-five miles of the road shall be completed and accepted by the United States. And that in the mean time the legal title to the unearned sections remains in the United States, who may therefore maintain legal proceedings against any one who unlawfully cuts timber upon them. (*United States v. Childers*, 8 Sawy. 171; *United States v. Ordway*, 30 West. Coast Rep. 30.)

I cannot add anything to the force of the arguments by which this eminent judge has maintained the conclusions he has reached. I will only remark that it would be a strange instance of improvidence or oversight on the part of Congress, if, when setting apart and devoting so large a portion of the public domain to aid and secure the construction of a railroad, it has conferred upon the projectors of the road the right to dispose of, encumber, or greatly impair the value of the lands by cutting the timber or other waste, when as yet the road only exists on paper, and when its construction has not been and perhaps never will be even commenced. But it is to be observed that by the terms of the law, upon the filing of the map designating the route of the proposed railroad, the granted sections are withdrawn from settlement and occupancy under the homestead and pre-emption laws. They therefore cease to be vacant public lands of the United States, so far as that phrase imports lands open to settlement, and whether or not the fee passes to the companies so that they can alienate, encumber, or waste them, at least an inchoate or inceptive title passes, which will ripen into a perfect title when it is earned by the construction of the road. And in the mean time the lands are held in trust for the company by the government, which has agreed not to dispose of or appropriate them.

Points decided.

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Whether the companies may not, while the road is in process of construction, enter and build fences upon the land, was not considered or decided by Judge DEADY. But whatever view may be taken of the nature of the railroad company's title to the granted sections before the completion and acceptance of so much of the road as will entitle them to a patent, it is, I think, plain that the entering and construction of fences upon the land are not within the prohibition contained in the act of 1885. That act, as the debates clearly show, was intended to prevent the enclosure and appropriation of vast tracts of public land, said to be millions of acres in extent, by associations of wealthy cattle owners, known as "cattle kings," without a shadow or pretense of title.

These tracts were surrounded by barbed wire fences, and all persons desirous of settling upon the land under the laws of the United States were vigorously excluded, in some cases by violence or threats. Such enclosures the law was intended to prohibit, and they were required to be demolished by the decree of the court. But great care seems to have been taken to restrict the application of this unusual and summary remedy to cases of wholly unauthorized appropriations and enclosures of public lands to which the party making the enclosure "had no claim or color of title made or acquired in good faith."

It certainly cannot be contended that the railroad company erecting fences on the granted lands have done so "without claim or color of title made or acquired in good faith." And it is only to such erections and enclosures that the act applies.

DENNY v. DODSON.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 28, 1887.

1. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EFFECT OF.—The congressional grant of the odd-numbered sections of the public land on the line of the Northern Pacific Railway to that corporation is a present one, and passes the legal title to the grantee; but the corporation is not authorized to dispose of or encumber the land without the consent of Congress, except the earned portions lying opposite to any twenty-five-mile section of the road, after the construction thereof, and the acceptance of the same by the United States.

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Statement of Facts.

2. SAME. — No entry could be made of any land, in an odd-numbered section within the limits of the grant, under the town-site, homestead, or pre-emption act after August 13, 1870, when the railway company filed its map of general route with the secretary of the interior, in the office of the commissioner of the general land office.
3. SAME. — The location of the line of the road in a state or territory determines the width of the grant—whether of ten or twenty alternate sections—without reference to the fact of whether the grant includes lands within the limits of a state or not.
4. SAME. — The condition attached to the grant to the railway company, that the road shall be completed by a day named, is a condition subsequent, for a breach of which no one but the government, the grantor, can claim a forfeiture; and the title of the company, though defeasible in the mean time, is still the legal one, on which it may maintain ejectment against any intruder or trespasser.

Before FIELD, Circuit Justice, and DEADY, District Judge.

Action to recover possession of real property.

This is an action of ejectment to recover possession of certain lots in the town of Arlington, Gilliam County, Oregon, being portions of section 21, in township 3 N., of range 21 E. of the Wallamet meridian, in that state.

The plaintiff claims title to them under the grant made to the Northern Pacific Railroad Company, by the act of Congress of July 2, 1864. The complaint alleges that he is the owner in fee of the premises; that the defendant is in possession thereof, and wrongfully withholds the possession from him to his damage of two hundred dollars. In order to show that the action arises under a law of the United States, so as to bring it within the jurisdiction of the circuit court, the complaint refers to the act of July 2, 1864, "granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," and to acts and joint resolutions supplementary thereto and amendatory thereof, and alleges that the plaintiff derives title to the lands in controversy, and holds them under those acts and resolutions, and by a deed from the Northern Pacific Railroad Company. The complaint then sets forth, that under these acts and resolutions, there was granted to that company, its successors and assigns, for the purpose of aiding in the construction of the railroad and telegraph line mentioned, every alternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of the railroad line, as the same

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the territories of the railroad through the premises in the grant, was on the 1st day of August, 1870, at that day, filed with the commissioner of the general land office, all lands included in the grant, as well as the right of way, were, by order of the commissioner, sold at public sale, entry, and auction, and this order has ever since been in force, and that on the twenty-first day of August, 1870, the road was definitely located at Washington, opposite the site of the building, the location of the road was definitely located, and the secretary of the interior, on the 21st day of August, 1870, of the general land office, the line thus definitely located, and the premises, on or about the 21st day of August, 1870, and that the land was sold to the President of the United States on the 21st day of August, 1870; that the commission of the interior, in accordance with the act of the interior, and the secretary of the interior, conveying the same; and that on the 21st day of August, 1870, upon the 21st day of August, 1870, as mentioned, the land was sold, and not mineral, and not for other set-off, and were free of all claims, and to them the land was sold, and otherwise than by the act of the interior, and that said lands became the property of the President, and that on or about the 21st day of August, 1870, for a valuable

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Opinion of the Court—Mr. Justice Field.

consideration, conveyed the premises to the plaintiff, who has since been and now is the owner, seised in fee and entitled to the possession thereof. The complaint concludes with a prayer that the plaintiff have judgment against the defendant for the possession of the premises, and for the sum of two hundred dollars damages for wrongfully withholding the possession from him. To the complaint the defendant demurred, upon the ground that it did not state a sufficient cause of action; and upon this demurrer the cause was heard.

Mr. Cyrus A. Dolph and Mr. Ralph M. Dement, for plaintiff.

Mr. Alfred S. Bennett and Mr. J. Q. Adams, for defendant.

By the Court, FIELD, Circuit Justice. As the complaint avers that the premises in controversy were a part of the land granted to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, and that they were free from any claims which would defeat their vesting in the company, at the time the general route of its railroad was designated, and a map thereof filed with the commissioner of the general land office, and the lands opposite to such route were withdrawn from sale, entry, and pre-emption, the only objections that can be raised upon the demurrer must go to the sufficiency of the title granted to maintain ejectment, or to the omission of the complaint to aver that the lands were as free from any other claims when the route became definitely fixed as when the general route was designated, and a map thereof filed; and such is the purport of the argument of the defendant.

As to the title, his contention is that the grant contained in the act of July 2, 1864, "was not a grant of title *in presenti*, but only of an inchoate interest" in the lands described; that the building of each twenty-five-mile section was, by the terms of the act, a condition precedent to the vesting of title to lands coterminous to such section; and that, upon the failure of the company to complete the entire road within the time designated in the act, the title to all lands not then earned remained in the United States, and could not pass to the company without affirmative action on the part of Congress. By "an inchoate

interest," as here used, is probably meant an interest which might afterwards be enlarged into a title as the construction of the road proceeded. To determine the weight of these objections, a careful examination of the language and object of the act of July 2, 1864, is necessary. (13 Stats. c. 217, p. 365.)

By the first section the Northern Pacific Railroad Company was incorporated, and authorized to lay out, construct, and maintain a continuous railroad and telegraph line, with the appurtenances, from a point on Lake Superior, in the state of Minnesota or Wisconsin, and thence westerly by the most eligible route, as should be determined by the company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch by the valley of the Columbia River to a point at or near Portland, in the state of Oregon. The company was also invested with all the powers, privileges, and immunities necessary to carry into effect the purposes of the act.

By the third section a grant of land was made to the company. Its language is:—

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any state, and wherever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office. And whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other

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lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

By the fourth section it was enacted:—

"That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, *confirming to said company the right and title to said lands*, situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company, conveying the additional sections of land as aforesaid."

By the sixth section it was enacted:—

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, *after the general route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company."

The act also declared that the grants were made, and the rights and privileges were conferred upon and accepted by the company, on the condition that it should commence work on the road within two years from the approval of the act by the president, and complete and equip the whole road by the 4th of July, 1876; and upon the further condition that, if the company should make any breach of the conditions of the grants, and allow the same to continue for upwards of one year, then at any time thereafter the United States might "do any and all acts and things" needful and necessary to insure a speedy completion of the road. By a subsequent act, the time for the commencement of the road was extended to July 2, 1868, and for its completion to July 4, 1878. (14 Stats. 355.)

The terms in which the land is granted do not support the contention of the defendant. They import the transfer of a present title, and not one to arise in the future. They are "that there be, and hereby is, granted" to the company every alternate section of the lands designated. There is nothing in them to indicate that only a partial or limited interest is intended. The lands themselves, described by the sections named, are granted; and, of course, whatever interest the United States possessed in such lands passed, unless the import of the terms be qualified by subsequent provisions of the act; and whether such is the case we shall presently consider. Similar terms are employed in a large number of congressional grants of land, and notably so in those made to aid in the construction of railroads. They have been considered by the supreme court in many instances, and in all of them have received the same interpretation; which is that unless restricted by other clauses of the act, they import a grant *in presenti*, conveying at once the interest of the United States to the lands described, whatever that may be.

As the sections granted are to be along the line of the railroad, they cannot be located until the line of the road is fixed. The grant is therefore in the nature of a float; and the title does not become definitely attached to specific sections until they are capable of identification. But when they are once identified, the title attaches as of the date of the grant, except as to such parcels as in the mean time by the terms of the act have been other-

wise appropriated. It is in this sense that the grant is termed a grant *in præsenti*. The cases of *Schulenberg v. Harriman*, 21 Wall. 44, 65; *Railroad Co. v. United States*, 92 U. S. 733; *Railway Co. v. Railway Co.* 97 U. S. 491; and *Railroad Co. v. Baldwin*, 103 U. S. 426, may be examined for further illustration of this subject, and the construction by the supreme court of similar terms of grant. In the *Leavenworth Case*, that court said:—

“‘There be and is hereby granted’ are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous similar grant. They vest a present title in the state of Kansas [the grantee named], though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them.” (92 U. S. 741.)

The *present title* here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The words “there be and is hereby granted” are not words of contract or promise, but, as said in the citation, are words of absolute donation; that is, they transfer a present legal right to the sections designated, which becomes attached to them specifically whenever they are identified.

The defendant contends that the natural import of the granting terms is qualified and restricted by the fourth section of the act, which provides that whenever twenty-five miles of the road are completed in a good, substantial, and workmanlike manner, and commissioners appointed to examine the same have made a report to that effect to the President, patents shall be issued “confirming to the company the right and title to said lands situate opposite to and coterminous with the said completed section of the road.” Why, it is asked, is there a necessity of such patents, if the title passed by the act itself? There are many reasons why patents should be issued upon the completion of portions of the road. They would identify the lands which are coterminous with the road completed; they would be evidence

that the grantee, in the construction of that portion of the road, had fully complied with the conditions of the grant, and to that extent the grant was relieved of possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantees' title to the lands embraced in them. They would thus be deeds of further assurance confirmatory of the grantees' title, and so be invaluable to them as a source of quiet and peace in their possessions. The word "confirming" is applied to such patents in section 4. Words of sale and transfer, if used, would not change the character and operation of the patents. There are many instances in the reports where such effect—that is, as deeds of further assurance, or as evidence of the grantees' previous title—has been given to patents authorized or directed to be issued to parties, notwithstanding a previous legislative grant of the premises to them, or a confirmation to them of a previously existing title. The case of *Langdeau v. Hanes*, reported in 21 Wall. 521, is an instance of the latter kind. The supreme court there said:—

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

See, also, *Wright v. Roseberry*, 121 U. S. 488, 497.

The case of *Rutherford v. Greene's Heirs*, 2 Wheat. 196, is also instructive on this point, as well as on the character of the title conveyed. In 1782 the state of North Carolina passed an act providing "that twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene," within the bounds of a tract reserved for the use of the army, to be laid off by commissioners designated in the act, as a mark of the high sense the state entertained of "the extraordinary

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services of that brave and gallant officer." The commissioners allotted the twenty-five thousand acres, and in 1783 caused a survey of them to be made and returned to the proper office; and the suit brought by Rutherford, who claimed, under a subsequent entry, five thousand acres of the same tract, turned upon the validity of Greene's title, and the date at which it commenced. It was contended by Rutherford's counsel that the words of the act gave nothing; that they were in the future, not in the present tense, and indicated an intention to give in future, but created no present obligation on the state, nor present interest in General Greene. But the court, speaking by Chief Justice Marshall, answered that it thought differently; that the words were words of absolute donation, not, indeed, of any specific land, but of twenty-five thousand acres in the territory reserved for the officers and soldiers; that, as the act of setting apart that quantity to General Greene was to be performed in the future, the words directing it were necessarily in the future tense; but that nothing could be more apparent than the intention of the legislature to order the commissioners to make the allotment, and to give the land when allotted to General Greene. And the court held that the general gift of twenty-five thousand acres, lying in the reserved territory, became by the survey a particular gift of that quantity contained in the survey, and concluded an elaborate examination of the title by stating that it was the clear and unanimous opinion of the court that the act of 1782 vested a title in General Greene to twenty-five thousand acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made and returned in pursuance of that act gave precision to that title and attached it to the land surveyed.

On the argument of the case it was also urged against the title of General Greene, that, by the constitution of North Carolina, there should be a seal of the state, to be kept by the governor, and affixed to all grants; and that the legislative act could not amount to a grant, since it wanted a formality required by the constitution. But the court answered that the provision of the constitution was intended for the completion and authentication of an instrument attesting a title previously created by law,

which instrument was merely the evidence of prior legal appropriation, and not the act of original appropriation itself. And the court said that this was so obvious that it would certainly have thought it unnecessary to advert to it, had not the argument been urged repeatedly, and with much earnestness, by counsel of the highest respectability.

While a legal title to the sections described, as distinguished from a merely equitable or an inchoate interest, passed to the railroad company by the act of July 2, 1864, it was not a title which could be disposed of by the company without the consent of Congress, except as each twenty-five-mile section of the road was completed and accepted by the President, so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the road and telegraph line, and, as is evident from different provisions of the act, Congress designed to secure this application of them. But such application would not, of itself, operate to transfer the title; there is nothing translati^{ve} of title in work performed. It would merely remove the restriction upon the use and sale of the title already granted. In that way it would not only give the grantee the right to a patent, but would render him free to sell and transfer that right to purchasers. But in advance of the construction of the road and telegraph line, or of particular portions, the lands could not be used without the permission of Congress, so as to cut off the rights of the United States mentioned above. Such permission was given, when, on the 31st of May, 1870, by the joint resolution of the two houses, Congress authorized the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and description, real, personal, and mixed, including its franchise as a corporation. In the property mentioned, the lands granted to the company are included. It can hardly be supposed that Congress would have allowed this mortgage, if the company had no legal title to the lands which could be held as security for the moneys advanced on the bonds

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and transferred by sale upon foreclosure, in case default should be made in their payment. To suppose that Congress would sanction such a proceeding would be to impute to it complicity in a fraud, which cannot be entertained for a moment. The conclusion follows that it allowed the execution of the mortgage, because it had transferred to the company a title to the lands covered by its grant, which could in this way be made available to raise funds for the work.

This interpretation of the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the property for the construction of the road and telegraph line, but it also secures the company against its alienation by the government to other parties. The legal title to the sections having passed, the government could not grant the land to others, when no forfeiture had been previously decreed.

My attention has been called to the case of *United States v. Childers*, 8 Sayw. 171, in which the district judge of this district holds that the act of July 2, 1864, does not operate as a present grant to the Northern Pacific Railroad Company of the lands described, but is merely an agreement or provision that the lands shall be conveyed to it absolutely when, and as fast as, any twenty-five-mile section of the road is constructed and accepted by the United States; and that, in the mean time, the title to the unearned and unpatented sections remains in the United States. This conclusion is founded upon the provision mentioned, that, notwithstanding the act contains words of present grant, a patent is to issue to the company for the coterminous odd sections, upon the completion of every twenty-five-mile section of the road and its acceptance by the President; and upon its supposed necessity to secure the application of the lands for the construction of the road, and enable the United States to apply the unearned and unpatented portion of them in case the company should fail to complete the road as rapidly as provided. The case of *Rice v. Railroad Co.* 1 Black, 358, is cited in support of this conclusion, where, in an act of Congress, words of present grant of land to the territory of Minnesota, to aid in the construction of a railroad, are held to be controlled by other clauses of the act. But those clauses

declared that *no title should vest in the territory*, until a continuous line of twenty miles of the road was completed—words to which no force could be given except as a limitation upon the terms of present grant, a circumstance which materially distinguishes that case from the present one. For the reasons already given, I am not able to accept the conclusion of the learned judge, who is so generally right in his decisions that one may well hesitate to dissent from his judgment.

It is not necessary to a recovery by the plaintiff that he should show that a perfect and indefeasible title to the lands granted immediately passed to the company, or anything more than a defeasible title, which would become perfect and indefeasible to coterminous lands as the road was completed. The road opposite to the premises in controversy having been completed and accepted, the title, however imperfect whilst encumbered, if it may be so termed, by the uses to which the lands were to be applied, has become perfect and indefeasible; and the costs of surveying, selecting, and conveying the lands having been paid into the treasury of the United States, the only remaining obstacle to their sale or other disposition by the company has been removed. During the construction of the road, no one could do anything to defeat the ultimate acquisition of a complete title by the company, however imperfect it may originally have been, except in one of the ways designated in the act; that is, by purchase, entry, or pre-emption, before the route of the road became definitely fixed.

The contention of the defendant against this view is that, upon failure of the company to complete the entire road within the period fixed by the act, or the supplementary act, the title to the land not then earned failed, and could be restored to the company only by affirmative action on the part of Congress; in other words, that the completion of the entire road within the time designated was a condition precedent to the vesting of title to all lands not previously earned by the construction of a road coterminous with them. For this position we find no warrant in any provision of the act. The conditions attached to the grant are conditions subsequent, and not precedent. The object of the grant was to aid in the construction of the road. The

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title granted is therefore made to attach to the sections designated as soon as the location of the route of the road is definitely fixed, and a map thereof filed in the office of the secretary of the interior, and is not in a state of suspense until the road, or a part of it, is constructed, although not subject to be disposed of by the company, without the consent of Congress, except as each twenty-five-mile section is completed and accepted. The conditions as to the construction and equipment of the road and telegraph line being subsequent and not precedent, no one but the government, the grantor, can claim a forfeiture for breach of them. This is but common learning. As was said by the supreme court in *Schulenberg v. Harriman*, 21 Wall. 62:—

“It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and if they do not see fit to assert this right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.”

The case of *Railroad Company v. Traill County*, 115 U. S. 601, is seemingly in conflict with the views expressed as to the character of the title granted to the company. On the 15th of July, 1870, in an act making appropriations for sundry civil expenses, and among other things, for the survey of public lands within the limits of the land grant to the Northern Pacific Railroad Company, Congress provided “that, before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest.” (16 Stats. 305, 306.) In the case cited, the supreme court had this provision before it, and in its opinion

there is an expression to the effect that the legal title to the lands granted remained in the United States until their conveyance was executed, that is, until their patent was issued. The question for judgment was, whether the lands of the company could be taxed by the county, under the laws of the territory of Dakota, before the patents issued. The court held that they could not be thus taxed; for, if taxed, they might be sold, and the government be thus deprived of the costs incurred in surveying, selecting, and conveying the lands. The government had, therefore, determined to withhold, until such payment, the issue of its conveyances, that is, its patents, which, as muniments of title, would, as already mentioned, be of great value to the company. By the act as originally passed, the title granted was not disposable, as already stated, without the consent of Congress, so as to cut off the rights of the United States upon breach of the conditions of the grant. Under the reservation clause of the act, the power to amend, alter, or repeal its provisions was possessed by Congress, and before the construction of the road and telegraph line was commenced, it imposed a new condition on the disposition of the title; and that was that the company should pay the cost of surveying, selecting, and conveying the lands—expenses incurred for its benefit—and that the patents, record evidence of the company's title, and of its absolute power to dispose of the lands, should not issue until such payment. The law was therefore, in its effect, an assertion of a lien upon the title papers, and upon the lands, for expenses necessarily incurred for their identification and survey, and in the preparation of conveyances by the government; and the decision of the court was, in substance, that such lien could be made available against any taxation or sales thereunder by the territory. Notwithstanding the expression referred to, it is not believed that the court intended to hold that a legal title to the lands had not passed by the grant to the company, and thus overrule or qualify a long line of decisions, announced after the most mature consideration, and discredit the security which, only a few weeks before, Congress had authorized by mortgage on the lands to raise funds to construct the road, but only to declare that the power of disposition by the grantee was stayed until the pay-

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ment of the cost mentioned was made, and that the right of the government to enforce such payment could not be defeated by the tax laws of the territory. As thus construed, the decision is in harmony with other decisions of that court upon similar grants of the United States.

It remains to consider the effect of the withdrawal of the lands opposite the general route of the road, by virtue of the sixth section of the act and the direction of the secretary of the interior, upon the rights of the company. The complaint, as is seen, alleges that at that time the lands in controversy were public lands, not mineral, and not reserved, sold, granted, occupied by homestead or other settlers, nor otherwise disposed of or located upon, and were free from pre-emption or other claims or rights, and to them the United States had full title, not appropriated otherwise than by said act of Congress, and the acts supplementary to and amendatory thereof. The act excepts from the grant such lands as are reserved, sold, granted, or otherwise appropriated at the time the line of road is definitely fixed and a plat thereof is filed in the office of the commissioner of the general land office. The complaint makes no allegation as to the condition of the premises in controversy at that time; and hence it is contended that the complaint is defective in not showing that the lands in controversy were then free from any town-site pre-emption or entry, the lands being within the town of Arlington, and, presumably, held under its pre-emption claim. There would be some force in this position if the withdrawal, under the sixth section, did not preclude any town-site pre-emption or entry after that date. This section declares that, after the general route of the road shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line, as fast as may be required for the construction of the road, and that the odd sections of land granted "shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." The law thus withdraws the land granted from sale, entry, or pre-emption from the time the general route is fixed; and the action of the secretary of the interior, in formally announcing that they are thus withdrawn, is giving publicity only to what

the law itself declares. The object of the law and of the official withdrawal is to preserve the land unencumbered until the completion and acceptance of the road, when patents are to be issued to the company. As was said by the supreme court in a recent case, speaking of the grant now under consideration:—

“Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.” (*Buttz v. Railroad Company*, 119 U. S. 55, 72.)

The term “entry” covers a homestead and town-site entry as well as a private entry made by a settler after the close of the public sales. It is used to designate the initiatory proceeding taken for the acquisition of a portion of the lands of the United States which are open to private sale; or, as said in *Chotard v. Pope*, 12 Wheat. 588, “it means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country,” by filing his claim in the appropriate local land office.

No interest in the lands granted against the rights of the company can be acquired after such withdrawal, nor, indeed, in the absence of its announcement, after the general route is fixed. As was said in the case of *Buttz v. Railroad Co.*:—

“The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of

Opinion of Deady, J., concurring.

the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office, or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side." (*Wolsey v. Chapman*, 101 U. S. 755; *Dubruque etc. v. Des Moines etc.* 109 U. S. 329.)

In the brief of counsel, argument is presented as to the lateral extent of the grant, the road passing through the territory of Washington, and, as represented, being located near the boundary line of Oregon. There is nothing in the complaint which indicates the distance between the line of the road and the premises in controversy. Its allegation is that the plaintiff derives title to them through the grant to the Northern Pacific Railroad Company, and that they are opposite to the route of the road as definitely fixed. These allegations may be taken as equivalent to direct averments that the premises are covered by the grant. But, independently of this consideration, there does not appear to be any serious question as to the lateral extent of the grant. The act of Congress makes that depend upon the location of the road, whether in a territory or in a state. If in the former, the grant has twice the extent that it has when located in the latter. It is the place of location which determines this matter. The nearness of the line to any other territory or state has nothing to do with it. Such, we understand, has been the uniform ruling of the land department, and that mode of determining the lateral extent of the grant is the only practicable one.

It follows from the views expressed that the demurrer to the complaint must be overruled, and the defendant required to answer; and it is so ordered.

DEADY, J., concurring. I concur in the conclusion of the learned circuit justice that, on the facts stated in the complaint, the plaintiff is the owner of the premises, and entitled to the possession thereof, for the reason that his grantor, the Northern

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Pacific Railroad Company, at and before the date of the conveyance to him, had constructed the section of its road opposite to the premises, and the same had been accepted by the United States.

After such construction and acceptance, whether the grant to the Northern Pacific is construed as an agreement to convey the land, or a grant to take effect when and as fast as any twenty-five miles of the road are completed, or as a present grant of the legal title, coupled with a restraint on the power of alienation of the land, until the same is earned by construction, the legal title was in the plaintiff's grantor, and the patent to which it was entitled may be deemed to have issued.

As was said by me in *United States v. Ordway*, 30 Fed. Rep. 35:—

"When the right to any odd section within the limits of the grant has finally vested in the corporation, by reason of the construction and acceptance of any portion of the road, the same will relate back to the time of filing the map of general route—the initiative step in the process of complying with the act; and the patent to which the corporation is then entitled may, for all practical purposes, be deemed to have issued."

As to all the other points covered by the opinion of the court, I fully concur in both the conclusions and the reasons given in support of them.

ANGUS N. McDONALD v. GEORGE COOPER.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 28, 1887.

1. PUBLICATION OF SUMMONS—AFFIDAVIT FOR, WHAT MUST SHOW.—(1) An affidavit for an order for service of summons by publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the state, after due diligence, and the mere assertion of the fact is insufficient. (2) But a statement of facts as to residence and actual abode of the defendant, which shows beyond a peradventure that any search for him within the state would be unavailing, is sufficient. (3) And where it is necessary to show that the defendant has property in the state, the statement thereabout should be direct and specify the property. (4) A summons published six times is thereby served on the defendant, after forty-two days from the date of the first publication thereof.

Before DEADY, District Judge.

Mr. W. Scott Beebe, for the plaintiff.

Mr. Julius C. Moreland, for the defendant.

DEADY, J. This action is brought by Angus McDonald, a citizen of California, by his guardian, D. C. McDonald, against William Hammond, J. Abbott, G. M. Haines, and R. Clinton, citizens of Oregon, to recover possession of lots 1 and 2, in block 120, in Stephens' addition to East Portland.

The answer of the above-named defendants admits they are in possession of the premises, but only as the tenants of George Cooper, without giving his place of residence, whom they then volunteer to state, is the "owner" of the premises, and ask that he may be substituted as defendant.

A person in possession of real property, as the tenant of another, may decline to make a defense to an action to recover possession of the same, and plead, "that he is in possession only as tenant of another, naming him and his place of residence." But he is not authorized to say that such other is the "owner" of the premises or to ask that he may be substituted as defendant. Having declined the controversy, he should be silent as to the merit or management of it.

The landlord may thereupon apply to be made defendant in the case; and if he does not do so, he may be made defendant on motion of the plaintiff. (Code Civ. Proc. sec. 314.)

Within ten days thereafter the defendant, George Cooper, appeared and answered the complaint, denying all the material allegations therein. The answer also contains a defense, denominated therein "a further and separate answer," to the effect that Cooper is the owner in fee-simple of the premises and entitled to the possession thereof. The plaintiff replied to this defense denying the same.

The case was submitted to the court without the intervention of a jury on an agreed state of facts, from which it appears, that the plaintiff is eleven years old last July and is a citizen of California, and D. C. McDonald is his guardian *ad litem*; that the plaintiff is the only child A. C. McDonald and Hortense,

his wife, the former of whom died intestate in Multnomah County and no administration was ever had on his estate; that on March 2, 1878, the deceased, being the owner of the premises, executed, with his wife, a mortgage thereof to B. Boeschen to secure the payment of one hundred and seventy-five dollars with interest, and that only fifty dollars thereof was paid; that on August 26, 1879, said Boeschen commenced a suit in the circuit court for the county of Multnomah against said Hortense and ——— McDonald, as the only child and heir of the deceased, to enforce the lien of said mortgage and the payment of the sum thereby secured; that in said suit a decree was given for the payment of the sum found due the plaintiff and for the sale of the premises to satisfy the same with costs, in pursuance of which they were sold by the sheriff to said Boeschen for sufficient to satisfy the decree; that said sale was duly confirmed by the court and a deed of the premises made by the sheriff to the purchaser, under whom the defendant holds by a chain of mesne conveyances duly executed.

It is also stipulated that if the proceedings in said suit by Boeschen had the effect to divest the plaintiff of his right to the premises the same is now vested in the defendant.

The invalidity of the decree on which the property was sold is urged on various grounds, either of which it is claimed is sufficient to show that the court had no jurisdiction to make the same.

The summons in the case was served by publication. The affidavit on which the order of publication was made was sworn to on August 25, 1879, and the suit was commenced by the filing of the complaint on the 26th of the same month. On the subject of the residence of the defendants and the diligence used to find them within the state, the statement in the affidavit is as follows: "They (the defendants) cannot be found within the state of Oregon, but both reside in San Jose, California, and that is their postoffice address." As to whether the defendants, or either of them, had any property within the state at the commencement of the suit, the statement of the affidavit is, that the plaintiff therein "has a good cause of suit against defendants to foreclose a certain mortgage on real property situate . . . in

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Oregon, executed by the defendant Hortense McDonald and her husband A. C. McDonald.”

The suit was commenced against Hortense McDonald and ——— McDonald, and the summons is so entitled and addressed. The order for publication does not find that the defendants, or either of them, had any property in this state at the commencement of the suit, or that any diligence was used to find them therein, but simply states “that personal service cannot be had upon said defendants, or either of them, in this state;” and directs that service of the summons be made on each of the defendants by the publication thereof in a certain newspaper, weekly, for six successive weeks, “and that a copy of the complaint and summons to be deposited in the postoffice, directed to each of said defendants at San Jose, California, their postoffice address.”

It appears from the record that the summons was published as directed, and a copy of the complaint and summons was timely deposited in the postoffice at Portland, addressed to Hortense McDonald, at San Jose, California, and another to ——— McDonald in care of Hortense McDonald.

The contention of the plaintiff is that the court never acquired jurisdiction of the defendants, and therefore the decree directing the sale of the premises is null and void. Several of the objections will not be considered, as that the affidavit for the order of publication was made the day before the commencement of the suit; that the plaintiff was sued as ——— McDonald, and the summons was so issued and published; and that the order of publication did not direct the copy thereof to be deposited in the postoffice as required by the Code of Civil Procedure, section 56, “forthwith.” The objection that the decree was given without the publication of the summons as directed in the order is not well founded. The summons was published six times in six successive weeks as directed, and more than forty-two days elapsed from the first publication to the entry of the decree.

And finally, it is contended that the order of publication is void on either of the following two grounds: (1) The facts stated in the affidavit do not tend to show that any diligence was used to find the defendants within the state, or that they could not have been found and served therein. (2) The facts so

stated do not tend to show that the defendants, or either of them, then had any property within the state.

The Code of Civil Procedure, section 55, provides that when the service of a summons cannot be made as provided in section 54, personally or at his usual place of abode, "*and the defendant after due diligence cannot be found within the state*, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, . . . and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, such court or judge . . . shall grant an order that the service be made by publication of a summons, . . . when the defendant is not a resident of the state, *but has property therein*, and the court has jurisdiction of the subject."

The order of publication in question was made under this section. That diligence has been used to find the defendant within the state must appear from the affidavit, and a mere statement or assertion therein that the party is a non-resident thereof is not sufficient. Nor is such statement or assertion that diligence has been used a compliance with the statute. The affidavit must contain some evidence of the ultimate fact, besides the assertion of the affiant, on which the judicial mind may act in granting the order. And however slight and inclusive this evidence may be, if it has a legal tendency to prove the diligence; and that the defendant could not be found in the state, it is sufficient to give the court jurisdiction and sustain the order against a collateral attack. But where there is no evidence of such diligence except the bald assertion of the fact, or that of non-residence, the order is void, and the court does not acquire jurisdiction. (*Rickertson v. Richardson*, 26 Cal. 153; *Forbes v. Hyde*, 31 Cal. 350; *Carleton v. Carleton*, 85 N. Y. 314; *Neff v. Pennoyer*, 3 Sawy. 288.)

In *Carleton v. Carleton*, *supra*, it was held that an affidavit for the service of a summons by publication was insufficient, wherein it was stated "that defendant has not resided in New York since March, 1877, and deponent is advised and believes is now a resident of San Francisco, California," because it was merely an allegation of non-residence, and did not tend to prove

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that the defendant could not, after due diligence, be found within the state. In delivering the opinion of the court Miller, J., said: "Cases may arise where the proof of residence in a distant state at the very time and of an absolute location there would be so strong and conclusive as to render it entirely apparent that no act of diligence would be of any avail; and if the affidavit here had stated positively and distinctly that the defendant was at the time not only a resident of the state of California, *but was then actually living in that state*, there would be ground for claiming that due diligence would be unavailing."

In *Kennedy v. The N. Y. L. Ins. & Trust Co.* 101 N. Y. 487, it was held that an affidavit for a similar purpose was sufficient, in which it was stated "that the defendants 'cannot after due diligence be found within the state'—they being residents of other states therein named—and 'that the summons herein was duly issued for said defendants but cannot be personally served on them by reason of such non-residence.'" In delivering the opinion of the court Miller, J., said: "Here is a clear statement that the defendants are non-residents and reside in other and *distant* states, and that the summons which has been issued cannot be served by reason thereof. . . . The statement as to due diligence is not absolutely an allegation of a conclusion of law, or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used."

In *Pike v. Kennedy*, decided in the supreme court of this state on November 15, 1887, it was held on the authority of the last two cases that the following affidavit was sufficient in this respect: "That said defendants reside at Walla Walla, in the territory of Washington, which is their postoffice address. That personal service cannot be made on said defendants, or either of them, for the reason that said defendants have departed from this state, and remained absent therefrom for more than six consecutive weeks, and *now* reside at Walla Walla."

Lord, C. J., in delivering the opinion of the court, said: "As we have seen, non-residence is not of itself sufficient to authorize the order for publication, because that alone is not inconsistent with the idea that the defendant may be in the state doing busi-

ness although his residence is in another state, and hence would not relieve of the necessity or requirement of due diligence. But the allegation of non-residence in connection with the facts additionally alleged, that he was *actually living* in the resident state, would be ground for claiming that due diligence would be unavailing.

The allegation of non-residence is specific and certain in the affidavit—the defendants reside at Walla Walla, Washington territory, and that is their postoffice address. *But this is not enough*, and the inquiry now is, whether the further statement, taken in connection with the averment of non-residence, that personal service cannot be made on the defendants for the reason that they have departed from the state, and remained absent therefrom for more than six consecutive weeks, and *now* reside at Walla Walla, show such a state of facts as render it apparent that no act of diligence would be of any avail to find them within the state. It seems to me that these averments taken together are legal evidence tending to show, at least, not only non-residence, but actual absence from the state at the time when the affidavit was made. . . . The averment that the defendants now reside at Walla Walla means at this time, or at the present moment they live or reside at that place; that is to say, that when the affidavit was made they were then living in Walla Walla. It is intended to emphasize the fact of *actual presence* at the place of residence at the time alleged, and is the reason why the affidavit says that personal service cannot be made upon them within the state.”

These New York cases and this Oregon one are the only authorities of which I am aware that hold that any state of facts concerning the defendant's whereabouts may be stated in the affidavit in place of the showing which the statute expressly requires—that “the defendant, after due diligence, cannot be found within the state.” But the ruling having been followed by the supreme court of the state, the decision is a controlling authority in this court on the question.

The case of *Pike v. Kennedy* carries the doctrine of the New York cases to the very verge. But notwithstanding this, the court does not intend to enlarge the rule, for it expressly says

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that the averment that the defendants *reside* at Walla Walla and that is their postoffice address "is not enough." The facts stated must show beyond a peradventure that the diligence required by the statute would have been unavailing. So long as they are consistent with any other hypothesis they are insufficient.

In this case the statement is, that the defendants "cannot be found in the state of Oregon, but both reside in San Jose, California, and that is their postoffice address."

In *Pike v. Kennedy* the court says explicitly this "is not enough." Notwithstanding this statement, it may be true that the defendants, or one of them, could have been found in this state at that time. San Jose is in the immediate vicinity of San Francisco, the commercial metropolis of an adjoining, not a "distant" state, between which and this city there was then constant and frequent communication and intimate business and social relations. No summons was attempted to be served; nor is it stated that the defendants, or either of them, had departed from this state or were then "actually living" at San Jose.

The affidavit is certainly fatally defective in this particular.

It must also appear from the affidavit that the defendant has "property" in this state. The bare assertion that the defendant has such property is not sufficient. Some fact or facts must be stated tending to establish this conclusion on which the judicial mind may act.

Nothing of the kind is set forth in this affidavit. And it is very doubtful if what is said even indirectly amounts to such an assertion. The statement is only to the effect that the plaintiff has a cause of action against the defendants to foreclose a mortgage on property within the state, executed by the defendant Hortense McDonald and her then deceased husband, and that the defendants were his heirs at law.

Admitting what may be implied from the execution of the mortgage, that A. C. McDonald then owned the property, it did not follow by any means that his widow and child owned it near a year thereafter, or even that he died seised of the same. He might have disposed of it by deed in his lifetime or by will at his death, and in case it had descended to the defendants, they might have disposed of it in the mean time. There is but

one expression in the whole statement that is not perfectly consistent with the hypothesis that the defendants had then no interest in the property, and that is, the plaintiff has a cause of suit against the defendants to foreclose a mortgage on real property.

If the defendants had no interest in the property the plaintiff could not maintain a suit against them on account of said mortgage, though he might attempt to. At most, this is a mere indirect, argumentative way of asserting that the defendants had property in this state. But if it was positive and direct, it was not enough in my judgment. There should have been evidence in the affidavit that the defendants had some interest in some specific property, and this is altogether wanting.

The defendant insists that reference may be had on this point to the verified complaint on file when the order was made. In *United States v. Walsh*, 1 Deady, 282, it was held that a verified complaint in an action for a penalty is an affidavit on which a writ of arrest may issue; and in *Neff v. Pennoyer*, 3 Sawy. 281, it was held that an order for the service of a summons by publication might be sustained by a reference to the verified complaint on file when it was made, unless it appears that the attention of the judge was not attracted to it.

The complaint in this case does specify the property on which the mortgage was given as lots 1 and 2, in block 120, in Stephens' addition to East Portland.

But the order was made at Astoria, one hundred miles away from the files of the court where the complaint was lodged; and it expressly states that it was "based" on the affidavit. On this state of facts the validity of the order must be tested by the statements contained in the affidavit alone.

This question was also considered in *Pike v. Kennedy*, and it appears to have been held that a statement in the affidavit to the effect that Pike and wife mortgaged lot 8, in block 183, in Couch's addition to Portland, to secure the payment of a sum of money to Klosterman Brothers, to enforce the lien of which mortgage the suit was brought, was a sufficient showing that the defendants had property in the state when the affidavit was made. The court says, these facts show that the defendants

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‘did have property in the state.’ Yes, when they executed the mortgage, of course, but how long after? Until the affidavit was made. I doubt it. In support of this conclusion the affidavit for an order of publication in *Belmont v. Cornen*, 82 N. Y. 257, is professedly cited, as containing only a similar statement to that in *Pike v. Kennedy*. But on examination of the former case it will be found that the affidavit also contains the statement, that the “defendants are proper parties to said action, as owners of the equity of redemption in said premises;” and further, “that the said defendants have property within this state, to wit, the said mortgaged premises hereinbefore referred to.”

However this may be, the affidavit in *Pike v. Kennedy* specified the property that was the subject of the mortgage and the suit, but in this it does not.

Counsel for the defendant, admitting the insufficiency of the affidavit in these respects, contends that the suit to foreclose the McDonald mortgage was a suit *in rem*, and that the jurisdiction of the court did not depend on the validity of the proceeding to authorize the publication of the summons, but on the fact that the property was within the state and the plaintiff had a lien thereon, citing *Cooper v. Reynolds*, 10 Wall. 308, and *Pennoyer v. Neff*, 95 U. S. 714.

In the former case, the effect of a judgment given in an action commenced by attachment of property, with notice to absent owners, was considered. The court held that the seizure of the property on attachment gave the court jurisdiction, and that its judgment could not be collaterally attacked on the ground of the irregularity or insufficiency of the notice. In the latter case the effect of a personal judgment against a non-resident defendant, who did not appear to the action, and was not served with process therein, otherwise than by the publication of a summons, was considered, and the judgment declared void, for want of power in the state to give extraterritorial operation to its process.

In the course of the opinion of the court delivered by Mr. Justice FIELD, it is said that notwithstanding the conclusion there reached, a state had authority to take and appropriate the property of non-residents, situated within its limits, to the payment of the claims of its own citizens against them. But this

state has not authorized the lien of a mortgage to be enforced by attachment or seizure of the property in the case of a non-resident mortgagor or his successor in interest, and when it does, it will be time enough to consider the effect of any cautionary or auxiliary notice that the law may require to be given of the proceeding. In the mean time, the only remedy given to the mortgagee is by an ordinary suit to enforce the lien of his mortgage by a sale of the premises, the foundation and jurisdictional element of which is an order for the service of the summons by publication.

My conclusion is, the order for publication in *Boeschen v. McDonald* is void, on the two grounds stated, and the subsequent proceedings therein, including the sale to Boeschen, are null and of no effect.

Of course it is not a pleasant duty to be compelled to disregard the results of judicial action in another court. But proceedings against absent parties by publication of summons are only allowed by statute, and the security against wrong and oppression which is thereby thrown around them ought to be fairly if not strictly enforced.

Nor will the consequence of so doing be very serious in this case. The period within which the lien of the mortgage may be enforced—ten years—has not yet transpired.

The mortgagee may still make his debt with interest out of the premises in another suit. Of course the rise in value of the property will go to the heir; but as this has not cost the mortgagee anything he cannot complain. In any view of the matter the child and heir is entitled to this "unearned increment," rather than the full-paid creditor.

There must be a finding that the plaintiff is the owner in fee-simple of the premises and is entitled to the possession of the same.

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**SUNSET TELEPHONE AND TELEGRAPH COMPANY v. THE
SHIPS CARL FREDERICK AND ENOCH TALBOT, ETC.**

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

DECEMBER 5, 1887

1. WHERE A VESSEL AT ANCHOR in the bay, while swagging to the tides, picked up and fouled with a Dutch kedge lying on the bottom unknown to and unsuspected by any, and dragged her anchor in consequence, thereby damaging a submarine telegraph cable. *Held*, that the accident must be attributed to peril of the sea, and that the vessel was not liable.

Before **HOFFMAN**, District Judge.

Messrs. Pillsbury & Blanding, for the libellant.

Messrs. Milton Andros, for claimants.

HOFFMAN, J. I have carefully reconsidered the evidence in these cases, and have come to the conclusion that the judgment heretofore rendered was erroneous.

That the cause of the accident was the fouling of the Enoch Talbot's anchor with a kedge, which had been lost or abandoned by some vessel, and which was lying on the bottom of the bay, unknown to and unsuspected by any one, is, I think, apparent.

When the anchor was hove up, after the accident, it came to the surface *crown up*, and with the chain so wound around it as to deprive it of all efficacy as an anchor, except from its mere dead weight.

It is suggested by the advocate for the libellants, that there is no proof that this fouling occurred before the Talbot began to drag.

There is, of course, no direct proof, because ocular observation was impossible.

But to what other cause can we attribute the dragging of the ship? There was no high wind or sea. The ebb tide was running, however, with unusual force. There was nothing, therefore, in the nature of a *vis major*, which could have caused a well-anchored ship to break from her moorings.

She had lain at the same place for eighteen days, when suddenly, on the night of August 7th, the second mate, who kept the anchor watch, observed that she was dragging.

The only probable explanation of this circumstance is that her anchor had fouled and lost its hold on the bottom, which in fact proved to be the case. To suppose that this occurred after she began to drag is to leave the dragging wholly unexplained and inexplicable.

But the condition in which the anchor and chain were found, when subsequently hove up, seems to demonstrate that the fouling must have occurred before and not after the dragging commenced, and was, in fact, the cause of it.

The condition of the anchor and chain was illustrated in court by the exhibition of a model.

From the number of turns which the chain had taken around the stock and crown, it was apparent that the ship must have swung to the tide more than once after the kedg was picked up, a fact inconsistent with the idea that the kedg was picked up after she, the vessel, began to drag and when she was drifting to the ebb tide.

If, then, the fouling of the anchor was the true cause of the accident, the collision must be ascribed to a peril of the sea, for such an unusual and unforeseen occurrence is like striking on an unknown or sunken rock, or a derelict wreck; an accident, for the consequences of which the ship is not responsible.

But the master of a vessel, even though the cause of the accident may be a peril of the sea, is, nevertheless, bound to the exercise of reasonable care and nautical skill to avoid or mitigate its injurious consequences.

The only fault charged upon the master in this case is that he did not let go his second anchor.

The second mate seems to have thought this advisable; but the captain's judgment was that he had not room enough to give her sufficient chain to bring her up before striking the Carl Frederick.

He further says the anchor would have dropped over the chain of the latter vessel and would have had no effect.

Both the captain and the second mate agree that the second anchor, if dropped, could not have prevented the collision, nor the subsequent drifting of both vessels down the bay to the vicinity of Blossom Rock.

This opinion is confirmed by the fact that when the master did let it go, because, as he says, he did not like to go on the rock with an anchor on his bow, it had no effect whatever and the vessels continued to drag until brought up by a change in the tide.

When the primary cause of disaster is shown to be a peril of the sea, the proofs should be clear that it might have been prevented by the exercise of reasonable skill and diligence.

Error of judgment ought not to create a liability, unless the error be such as to show incapacity of the want of that degree of professional skill which may reasonably be exacted of a ship master.

It must also plainly appear that, but for that error, the damage would have been avoided or appreciably mitigated.

I do not consider that the proofs show that the master in this case committed any error disclosing a want of reasonable skill and diligence.

I think, on the contrary, that the preponderance of proof is in favor of the conclusion that the dropping of the second anchor would have been wholly ineffectual to prevent or modify the injurious consequences of the accident.

Libel dismissed.

THE SALEM (OREGON) CAPITOL FLOUR MILLS COMPANY
v. THE STAYTON WATER DITCH AND CANAL COMPANY
ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 19, 1887.

1. WALLAMET WOOLEN MANUFACTURING COMPANY—POWER TO DISPOSE OF ITS WATER RIGHT. —The act of December 18, 1856 (Sess. Laws, 47), declaring certain persons and their associates to be a corporation by the name of the "Wallamet Woollen Manufacturing Company," for the purpose of creating and improving water powers and privileges and manufacturing, conferred on said corporation the power to dispose of the whole or any part of the "privilege" therein granted, to take and conduct water from the Santiam River, to or near Salem, and the "hydraulic power" thereby created.
2. TRUST ESTATE—CESTUI QUE TRUST. —A trust estate may be created without a *cestui que trust* in existence, so that one is named in the trust, and comes into being and may be distinguished during the life of the trustee.

3. **GRANT OF CANAL WAY AND RIGHT TO TAKE WATER FROM THE SANTIAM.**—P. and wife, for a valuable consideration, granted W. W. and R., to the use of the Wallamet Woolen Manufacturing Company "alone," the right to take water from the Santiam anywhere on their donation, and to cut and maintain a canal over and upon said donation capable of carrying sufficient water from said river for the purposes of said company at Salem. *Held*, (1) That under the act of 1854, regulating conveyances (2 Or. Laws, sec. 3005), the duration of the easement granted depends on the intent of the parties and the estate of the grantor in the land burdened therewith, both of which show that the easement was granted in fee-simple, and is perpetual and assignable with the dominant estate or land in connection with which it is used; (2) that the word "alone" only signifies that the grant was made for the sole use or benefit of the company and not the trustees or other person; (3) that the grantee of the easement and its successors in interest are entitled to cut and maintain a ditch over and upon any part of the donation necessary to enable it to take the water from the Santiam, and if by reason of a change in the bed of the stream or other like cause, it becomes necessary to deepen, widen, or prolong said ditch to get said water, it may be done.
4. **CONTINUOUS TRESPASS.**—Equity has jurisdiction to enjoin and prevent the commission of a continuous trespass, on the ground of the inadequacy of the remedy at law.

Before DEADY, District Judge.

Mr. William B. Gilbert, for the plaintiff.

Mr. Parish L. Willis, for the defendants.

DEADY, J. This suit is brought by the Salem Capitol Flour Mills Company, a British corporation, against the Stayton Water Ditch and Canal Company, a corporation formed under the laws of Oregon, and Silas A. and S. W. R. Jones, citizens of Oregon, to have said defendants enjoined from interfering with the prolongation of the plaintiff's ditch, whereby water is taken from the Santiam River and conducted in the channel of Mill Creek to Salem for the use of the plaintiff's mills; and from diverting the water from the same.

The defendants demur to the bill, for that the plaintiff is not entitled to the relief sought.

For a proper understanding of the case, a somewhat full abstract of the lengthy second amended bill and the amendment thereto must be made.

It appears therefrom that on December 17, 1856, the legislature of the territory of Oregon passed an act incorporating the Wallamet Woolen Manufacturing Company, hereinafter called the "Woolen Company," and thereby conferred upon it "power

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to bring water from the Santiam River to any place in or near Salem," through the channel of Mill Creek, as far as practicable; and for such purpose authorized it to enter "upon lands and also upon said creek; and do all things proper and suitable for a safe, direct, and economical conveyance of water as aforesaid;" and conferred on said company the exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River; and to "use, rent, or sell the same, or any portion thereof, as it may deem expedient."

Under this act the Woolen Company, at great expense, forthwith dug a ditch from a point on the right-hand bank of the Santiam, near the town of Stayton, to a point in the channel of Mill Creek, and did thereby conduct water from the Santiam through said channel to Salem; that in 1857 the Woolen Company erected woolen mills at Salem on the bank of said Mill Creek, on land then belonging to it, and particularly described in the bill, and thenceforward until May, 1876, when the building was destroyed by fire, operated the same continuously by force of said water; that said water-power was and is of great value, and the Woolen Company kept the exclusive use of the same until April 11, 1870, when it granted to the Salem Flouring Mills Company the right to have one half the water flowing through said ditch and channel to Salem conducted to its premises therein, and the water right granted to William Waldo on May 1, 1874.

On August 24, 1875, the Woolen Company executed and delivered to the Bank of British Columbia a mortgage on all the said property, rights, and privileges so owned by it, and thereafter in a suit brought in this court to enforce the lien of said mortgage, the same was sold and conveyed to William Reed on September 6, 1882, who afterwards sold and conveyed it to the City of Salem Company, which company on June 1, 1884, sold and conveyed the same to the plaintiff, which thereupon became and still is the owner thereof; that the grant to Waldo was a perpetual right to use the water so brought to Salem for the purpose of operating a flour mill to be built on a tract of ground on the bank of Mill Creek just below the property of the Woolen Company, and containing about two acres, whereupon he erected

a flour mill, which since 1877 has been operated by the water aforesaid, and about June 1, 1884, the plaintiff by mesne conveyances from Waldo to itself became and still is the owner of said mill property and water rights; and that in 1882 the plaintiff built another flour mill on property adjacent to said mill, and said flour mills have ever since been operated by the water of the Santiam, and would be comparatively valueless without the same.

The ditch was constructed from near the town of Stayton to the Santiam on the donation of Stephen Porter and his wife, who theretofore, on April 3, 1856, for a valuable consideration, had by their deed granted to George H. Williams, Joseph Watt, and A. H. Reynolds, to the use of said Woolen Company, "the right of a canal way through all and any lands then owned or occupied by them in Marion County, necessary to be passed through in conveying the water of the Santiam into the channel of Mill Creek," and also granted to said persons for the benefit of said company authority "to enter on the same for the purpose of cutting a canal sufficiently large to admit the flow of any amount of water required by said company for their purposes at Salem," and agreed "to allow them all the rights and privileges necessary for the construction, use, and preservation of said canal;" that at the date of such conveyance said Williams, Watt, and Reynolds were the trustees of the corporation for whose benefit said rights were conveyed, and the plaintiff by the mesne conveyances aforesaid "has become and now is the owner of and entitled to all the rights, powers, and privileges thereby granted."

On May 7, 1852, the date of the official survey of the donation of Stephen Porter and wife, the meandered line of the north bank of the Santiam was the southern boundary of the same, which included all the land in the fractional southeast quarter of section 10 and the fractional southwest quarter of section 11, in township 9 south, of range 1 west, of the Wallamet meridian, lying north of said meandered line, as shown on the map entitled exhibit A; that at the time of the execution of the deed by Porter and wife and the construction of the ditch the position of the Santiam had gradually changed to the northward so

that the north bank of the same crossed the line between said sections 10 and 11, 8.25 chains north of its intersection with said meandered line; that said ditch took water from the north bank of the Santiam at a point 15 chains west of the line dividing said sections and 6.75 chains from the nearest point on said meandered line, and designated on exhibit A as "W. W. Mfg. Co.'s dam, built in 1857," and said Woolen Company continued to receive water into its ditch at said point for the use of its mills at Salem until 1872, when, by reason of a freshet in the river, the channel thereof was suddenly changed to the southward 30 chains from the point where the ditch connected therewith, and has ever since flowed in this new channel, wherefore said Woolen Company was obliged, and did, in 1873, prolong its ditch eastward from its eastern terminus, along the right bank of the old channel of the river to the junction with the new, and in so doing expended a large sum of money in excavating said channel, in banking the left side of the ditch, and in constructing wing dams and head gates thereon, and thereby received and used the water of the Santiam, as before.

On July 20, 1876, Stephen Porter and wife made a conveyance to sundry persons of the land on which the ditch was prolonged as aforesaid, and thereafter the grantees therein, on January 12, 1877, and Drury Stayton, who had been placed in possession of the ditch by the Woolen Company, to care for the same and regulate the flow of water therein, conspired together and took possession of the prolongation of the ditch, claiming a right to the same, and on November 12, 1879, said grantees conveyed the same to the defendant, Silas A. Jones.

In January, 1880, the defendants, Silas A. and S. W. R. Jones, procured the incorporation of the defendant, the Stayton Water Ditch and Canal Company, of which they are the principal stockholders, for the purpose of constructing and maintaining a ditch from the town of Stayton to a point on the north bank of the Santiam, where the prolongation of the plaintiff's ditch terminates; that said corporation took possession of said prolongation and conducted water through the same to and below the point where the plaintiff's ditch terminated in 1872, and by means of a canal there connecting with said ditch supplied the

town of Stayton with water, and said Silas A. Jones has given some pretended license or easement to said Stayton company in and about said prolongation, to the plaintiff unknown, and did, in 1886, convey to S. W. R. Jones the property acquired by him under the deed of November 12, 1879; that from the formation of the Stayton corporation until 1882 it and the defendant, Silas A. Jones, held possession of said prolongation, denying any right of the plaintiff's grantor thereto, and in 1882 said corporation constructed a ditch from a point on said prolongation, 15 chains west of the eastern end thereof; in a southwesterly direction, to a point 6 chains south and below the eastern end of the plaintiff's ditch, and thence to the old canal leading to Stayton, whereby the defendants can send the water which is received from the Santiam at the eastern end of the prolongation to the town of Stayton, and shut it off altogether from the plaintiff's ditch, and thus prevent it from reaching Mill Creek; and they have since 1883 refused to allow any of the water of the Santiam to flow into the prolongation beyond said point of diversion unless the plaintiff or its grantors would pay them for the same; that said defendants have threatened, and do threaten, that unless the plaintiff will recognize their claim and pay them what they demand therefor, they will not allow any water to flow into its ditch, and thereby deprive it of the use of the water of the Santiam; and said defendants assert that they have been in the continuous and adverse possession of said prolongation, through said Drury Stayton and others, since January 12, 1877, claiming to own the same, and that in ten years therefrom they will have acquired the exclusive right thereto; that the acts of the defendants in this respect have been without the consent and against the protest of the plaintiff and its grantors.

In January, 1877, the Woolen Company temporarily ceased to use said ditch and water-power, and having no officer or agent at or near Stayton, had no knowledge of the claim made by the defendants, or their grantors, to the same, until the defendants began the construction of their ditch in 1882, at which time the title of plaintiff's grantors to said ditch, and the privileges connected therewith, as derived from the act of the legislature aforesaid, had been controverted in this court, in the

suit to enforce the lien of the mortgage aforesaid, on the ground that the Woolen Company could not mortgage or transfer the same; and after the decision of this court in favor of the right, the case was appealed to the supreme court of the United States, where a decision in favor of such right was not reached until December, 1886, but for which litigation the plaintiff and its grantors would long since have brought suit to protect their rights.

The capital stock of the Stayton corporation is four thousand dollars, fully paid up, and both it and Silas A. Jones are insolvent; but as to S. W. R. Jones, the plaintiff is not advised as to his responsibility or the extent and nature of his claim to said property or water rights.

The bill prays that the defendants may be enjoined from interfering with the flow of water in said prolongation or asserting any right thereto, and that they be required to remove the dam constructed across the same and close up the opening made by them in the left bank thereof.

The first question raised by the demurrer is as to the nature and extent of the "power" or "privilege" granted to the Woolen Company concerning the water of the Santiam by the act of 1856, and its authority to dispose of the same.

The unqualified right to take water from the Santiam and conduct the same to or near Salem, through the channel of Mill Creek, is expressly granted by section 5 of the act; and for such purpose the company is thereby also authorized to enter on "lands" and said "creek," "and do all things proper and suitable for a safe, direct, and economical conveyance" of such water, subject to the payment of damages for any injury to the property of another.

Section 6 of the act provides: "Said corporation shall have the exclusive right to the hydraulic powers and privileges created by the water which is taken from the Santiam River, and may use, rent, and sell the same, or any portion thereof, as it may deem expedient.

The purpose and intent of this section is plain enough, although it must be admitted that its composition is faulty and confused. The "hydraulic powers" are "created by the water" in motion after it is taken from the Santiam, in fact, it is the

power of the water in motion. This power the company was authorized to dispose of in whole or in part wherever it existed. But the water created no "privilege." That was created by the act, and consisted in the right to take water for hydraulic purposes out of the Santiam. This "privilege," and the "power" resulting from its exercise, the Woolen Company was authorized by this section to dispose of by mortgage or otherwise. It was so held by this court in the suit to enforce the lien of the mortgage given by the company to the Bank of British Columbia, and on an appeal to the supreme court the ruling was affirmed (*Wallamet Manuf. Co. v. Bank of B. C.* 119 U. S. 191); and there ought never to have been any question about it.

The extent and nature of the power consists simply in the right to take water from the Santiam, without limit or restriction as to quantity or place, and conduct the same to Salem by the route indicated. The river may be tapped at more than one place at the same or successive times. In short, there is no limitation on the power, and it is granted subject to only one condition, that the company "shall be answerable in damages to any person whose property is injured by its acts."

And now, what right did the plaintiff's grantor, the Woolen Company, acquire under the deed of Porter and wife? This deed grants to Williams, Watt, and Reynolds, for the consideration of four hundred dollars, the right to cut a canal way through any lands owned or occupied by the grantors, for the purpose of taking the water out of the Santiam to the channel of Mill Creek, in any amount the company may require for its "purposes at Salem"; and the grantors therein thereby agree to allow the company "all the rights and privileges necessary for the construction, use, and preservation of said canal."

The power and privilege was not exhausted by the construction of the ditch to a certain point on the river in 1857. For the purpose of maintaining a canal or ditch on, over, and through the Porter donation, so as to receive and take water from the Santiam thereon, in such quantity as the company or its successors in interest might or may need or require at Salem, it continued and still continues in full force. Therefore, when the channel of the Santiam was in 1872 suddenly deflected to the

southward and away from the eastern terminus of the Woolen Company's ditch, so that no water flowed therein, the company had a right to make any necessary prolongation of the same, anywhere on such donation, including the former bed or channel of the river, so that sufficient water would again flow through it to the channel of Mill Creek.

But the same result would follow, if the stipulation for the "preservation" of the ditch was not in the Porter deed. In the nature of things and by the terms of the deed the grant was in fee—without limitation. The act then and since in force in regard to conveyances provides: "The term 'heirs,' or other words of inheritance, shall not be necessary to create or convey an estate in fee-simple; and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant."

This provision is applicable to the grant of an easement which is an interest in land, by deed, such as the plaintiff claims in the Porter donation. This easement may be for years, for life, or in fee (Wash. Ease. 4th ed. 26), owing to the terms of the deed and the circumstances under which it was executed, subject, however, to the rule prescribed by this statute, that no words of inheritance are necessary to create an easement in fee, and that the duration of the grant shall equal that of the estate of the grantor in the lands subject to the easement, unless a contrary purpose shall appear.

At the date of the grant of the easement, Porter and wife were seised of an estate of inheritance in the land, and there is nothing in the terms of their deed or the nature or purpose of the easement which at all indicates an intention to grant the easement for a less time than the duration of their own estate in the premises, but the contrary. Hence the right to maintain a ditch on and through the Porter donation, to conduct water from the Santiam to the channel of Mill Creek, for the purposes of the Woolen Company at Salem, is perpetual; and if, in the course of time or events, it becomes necessary, to accomplish such purposes, to widen, deepen, or lengthen said ditch, the then owner of the easement may do so.

As was said in *Pomfret v. Ricroft*, 1 Saund. 322: "When the use of anything is granted, everything is granted by which the grantee may have and enjoy such use." (See, also, on this point, *Prescott v. White*, 21 Pick. 341; 32 Am. Dec. 266; *Collins v. Driscoll*, 54 Conn. 43; *Donnell v. Humphreys*, 1 Mont. 518; *Dyer v. Depui*, 5 Whart. 584; *Thompson v. Uglow*, 4 Or. 369.)

But the right of the Woolen Company to flow the water of the Santiam over the old bed of the river to its ditch may be rested on another ground than its right to prolong its ditch and use such old bed for such prolongation. When a stream is suddenly diverted from its channel, any person who has acquired a right to the water flowing in such channel may return it to the same. (Wash. Ease. 4th ed. 444.) The Woolen Company, as the grantee of Porter and wife, had an interest in the flow of the Santiam in its channel by the eastern end of its ditch, and therefore upon its sudden diversion to the southward it had a right to turn the river back to the old channel, or at least, so much thereof as was necessary for its "purposes at Salem." And in so doing it might facilitate the passage of water from the new to the old channel and through the latter to its ditch, by wing dams and by deepening and cleaning the same and confining the flow within narrower limits, or other proper and suitable means.

But whether the course of the Santiam changed suddenly or gradually, so long as it ran over or upon any portion of the Porter donation, the Woolen Company had a right under the grant to prolong or extend its ditch over and upon the same to the river, and take the water therefrom and conduct the same to the channel of Mill Creek and thence to Salem. And in my judgment, if the Santiam should change its course so as to leave the Porter donation altogether, the party entitled to the benefit or privilege granted to the company might extend this ditch in any direction through said donation, so as to reach the stream and take water therefrom.

But it is objected that the deed from Porter and wife is void for want of a *cestui que trust* at the date of its execution.

It appears from the deed and act that a number of persons were then associated together in what they called "a joint stock

company," under the name of "The Wallamet Woolen Manufacturing Company." As a matter of law this association was nothing but a partnership doing business under this name, as it lawfully might. The grant was made to Williams and Watt, two of the partners, and Reynolds, for the use of the company, and soon after the persons constituting the same were by the legislature "declared a body politic and corporate," with the organization and name then in use by them. The natural persons constituting this association, partnership, or company, and calling themselves collectively The Willamette Woolen Manufacturing Company, were in existence at the date of the deed and capable of taking the beneficiary interest in the grant. The description of them as stockholders in a certain "joint stock company" was a sufficient designation of them. (*Friedman v. Goodwin*, McAll. 149.) But if this were otherwise, and there was no *cestui que trust* or use in existence at the date of the deed, nor until the actual incorporation of the Woolen Company in the December following, the objection is not well taken. Mr. Washburn (2 Wash. Real Prop. 3d ed. 173), after a careful review of the authorities, says: "It may be laid down as a general proposition that it is not necessary in order to create a trust estate, that a *cestui que trust* should be named, who is in being." And again (2 Wash. Real Prop. 3d ed. 198), he says: "A trust may be valid and effectual, where a trust is named, although the *cestui que trust* may not then be *in esse*, provided such *cestui qui trust* subsequently came into being." (See, also, on this point, *Ashurst v. Given*, 5 Watts & S. 328; *Urket v. Coryell*, 5 Watts & S. 60.)

Counsel for the defendants set out the deed in his brief as it should have been in the bill, from which it appears that the consideration for the deed was four hundred dollars, and that thereby Porter and wife did "release and quit claim" to the trustees therein named the easement in question to the use of the Woolen Company "alone"; and that the word "assigns" is not used therein, or any other word or phrase indicating an intention on the part of the grantors that any assignee or successor in interest of the company should have or exercise the rights and privileges thereby granted.

The term "assigns" is not necessary in a deed, either as a word of limitation denoting the quantity of the estate granted, or to give the grantee authority to dispose of the same. When the Woolen Company acquired the easement in question it took the same with the rights to dispose of it at pleasure, unless restrained by some express provision in the deed or for lack of authority as a corporation. The deed contains no such provision, and the act, as we have seen, conferred on the company an unqualified power of disposal.

The necessity of using the word "alone" in this connection is not apparent. But the only effect that can be given to it with any show of sense or reason is that the trustees named in the deed took the right and privilege thereby granted, not for themselves, but *solely* for the use and benefit of the Woolen Company; and this is no restraint on the disposing power of the latter. And a voluntary sale of the right and privilege by the company, or one made on legal process to satisfy its debts, would so far be a disposition to the "alone" or sole use of the company. If Porter and wife had sold their donation outright to these three trustees, to the use of the Woolen Company "alone," the result would have been the same. The company being the owner of the property could dispose of it when and to whom it pleased.

And lastly, it is objected that this right is an easement in gross and therefore not assignable by the grantee, the Woolen Company. In support of this conclusion, it is claimed that there is no land or estate described in the deed in connection with which the water taken from the Santiam was to be used.

It is common learning that a right or easement in or upon the land of another, to be used by the grantee generally and not in connection with or dependent upon any other land or estate, is not assignable. It is called a right in gross, in bulk. It belongs to the person and dies with him. But an easement, such as a right of way over the land of another or to take water therefrom, is said to be appurtenant or appendant when the grant thereof is made with reference to other land, whereon or in connection wherewith it is to be used or enjoyed. The land which is burdened with the way or from which the water is taken is called the servient estate, while that which is benefited by the

easement is called the dominant estate. The easement is said to be appendant or appurtenant to the dominant estate, and passes with it as an incident thereof. (3 Wash. Real Prop. 340; Wash. Ease. 2, 18.)

An easement appurtenant, as against one in gross, is favored in the law, and courts will not construe a grant of an easement to be a mere personal right, unless such intent plainly appears. Mr. Washburn (Wash. Ease. 45) says: "Though an easement, like a right of way, may be created by grant in gross, as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate, and if it is in gross it cannot extend beyond the life of the grantee."

The deed of April 3, 1856, provides that the canal to be cut through the grantors' land shall be "sufficiently large to admit the flow of any amount of water required by said company for their purposes at Salem, and agree to allow them all the rights and privileges necessary for the construction, use, and preservation of said canal."

It is manifest from the deed, and the circumstances attending its execution, that the grant to the Woolen Company was made and received with the intent and purpose that the water of the Santiam would be taken from and through the Porter donation and conducted by the company to or near Salem, and there used, at least to operate the mill or mills of the grantee then or thereafter to be built at that place. There being no limit to the time when the grantee should commence to take and conduct this water to Salem, or the quantity it may take and use, and as the grant is in fee and assignable with the dominant estate, in my judgment the owner of such estate, or its successors in interest, may continue to take this water from the Santiam and conduct it to Salem, and there use it to operate any mill or machinery owned by them, no matter when erected.

And under power given to the Woolen Company, by its act of incorporation, to dispose of the water at pleasure, it and its successors in interest in the dominant estate, and this easement and appurtenances thereto, may conduct and deliver this water at Salem for hydraulic purposes to others on such terms and

conditions as may be agreed on. Of course the legislature could not confer on the company any right to enter on the land of the Porters and take this water without their consent, or the payment of damages therefor.

But the deed of Porter and wife practically gives the company the right to take out of the river, on the Porter donation, all the water it wants for its purposes at Salem; and the disposition of it, when there, as authorized by the act, cannot work any prejudice or wrong to the grantors or their assigns, by a subsequent grant or conveyance, such as these defendants claim to be.

The right to relief in equity under the circumstances is clear. The remedy at law is utterly inadequate. The interference of the defendants with the prolongation of the plaintiff's ditch, and the flow of water therein, is a continuous trespass, and an injunction will be allowed to prevent it, at least on the ground of preventing a multiplicity of suits. The remedy by an action at law for each act or each day the trespass is repeated is altogether inadequate. (3 Pom. Eq. Jur. sec. 1357; *Coulson v. City of Portland*, 1 Deady, 494.)

Counsel for the defendants in his brief refers to an action of ejectment pending in this court by the plaintiff against these defendants for the possession of the prolongation of this ditch. But the result of the action will not determine the right of the defendants to take water therefrom, nor prevent the defendants from lowering the willow dam which they have constructed below the old dam of the plaintiff's which they have partially removed, by which means they can draw off all the water that enters said prolongation and not allow any of it to enter the ditch leading to Mill Creek.

The demurrer is overruled.

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Opinion of the Court—Sawyer, C. J.

HAMILTON v. SOUTHERN NEVADA GOLD AND SILVER MINING COMPANY.

CIRCUIT COURT, DISTRICT OF NEVADA.

DECEMBER 23, 1887.

1. **MINES AND MINING—LOCATION OF—RIGHTS UNDER.**—The locator of mining ground under the United States Revised Statutes, prior to the actual payment of the purchase money, and the reception by him of the receipt therefor, issued by the register and receiver of the proper land office, possesses a mere privilege to purchase the property, and a constable's sale of the mine before payment only passes that privilege. If the sale is valid, the purchaser can only step into the shoes of the execution debtor, and thereby obtain a right to go on, perform the necessary acts, pay the purchase money, contest the rights of other adverse claimants, and make the entry and receive the certificate of purchase himself. If the judgment debtor subsequently performs these acts and receives the title from the government, a new and further title becomes vested in the judgment debtor, which does not pass by virtue of the officer's deed.
2. **PUBLIC LANDS—TITLE TO—PAYMENT—RECEIPT.**—A party having paid the purchase money, and received the certificate of purchase, is the owner of the land. The United States has ceased to have any pecuniary interest in it. It holds the naked, dry, legal title for the holder of the certificate.
3. **SAME.**—Such a certificate of purchase cannot be collaterally assailed.
4. **LIMITATIONS OF ACTIONS—MINING CLAIM—ADVERSE POSSESSION.**—Possession of a mining claim, in order to vest a title under the statute of limitations, must be open, notorious, exclusive, and continuous; and not a loose, uncertain, scrambling, and mixed possession.
5. **MINES AND MINING—ADVERSE CLAIMS—PUBLICATION OF NOTICE.**—Under an application for a patent for mining ground, under sections 2325 and 2326, Revised Statutes, unless adverse claims are filed with the register and receiver of the proper land office within sixty days after the first publication of the notice, such adverse claims are waived, and the applicant is entitled to a patent upon the payment to the proper officer of the statutory fees and costs, and it shall thereafter be assumed that no adverse claim exists; and thereafter no objection from third parties to the issue of the patent shall be heard, except that it be shown that the applicant has failed to comply with the terms of the statute.
6. **SAME.**—The interest or title obtained by a purchaser at a constable's sale prior to the expiration of the publication of the notice is an adverse claim, which, unless filed as the statute provides, is waived.
7. **SAME.**—The statute makes such a proceeding regularly prosecuted when the period of notice is completed, without the presentation of an adverse claim absolutely conclusive against adverse claims. The proceeding is in the nature of a proceeding *in rem*, and is binding upon all the world, so far as any unrepresented adverse claims are concerned.
8. **JUDICIAL SALE—TITLE OF PURCHASER.**—The purchaser at a judicial sale acquires only the present interest of the judgment debtor. No after-acquired title is affected by such a sale. The sheriff's deed can, at most, only have the operation of a quit-claim deed in the strictest sense.
9. **EQUITY—MASTER—OBJECTIONS BEFORE.**—The general objection, "irrelevant and incompetent," made before the master in an equity case, is not sufficiently specific to be entitled to consideration upon the hearing.

10. SAME—PRACTICE—OBJECTION TO TESTIMONY—AMENDMENT OF PLEADINGS.—Where an objection to the relevancy or competency of the testimony is made specific for the first time in the closing argument for the complainant in an equity case, the court will permit the defendant to so amend his pleadings as to obviate the objection, where the testimony is before the court showing a proper case therefor.

Before SAWYER, Circuit Judge.

In equity.

This suit is brought by plaintiff Hamilton, against the Southern Nevada Gold and Silver Mining Company, to determine an adverse claim of title to a mine.

Mr. R. S. Messick and *Mr. M. N. Stone*, for complainant.

Mr. J. McM. Shafter, *W. C. Belcher*, and *Messrs. Scrivner & Boone*, for defendant.

SAWYER, Circuit Judge. This is a suit in equity, brought under the statute of Nevada, by a party claiming to be in possession against a party alleged to be out of possession, to determine an adverse claim of title to a mine. The locator's title was conveyed to defendant June 30, 1880, and the complainant alleges that he has obtained the title so conveyed to defendant, through sales on certain judgments made subsequently to the said conveyance of June 30, 1880. A constable sold the premises on a judgment rendered by a justice of the peace against defendant, said sale having been made July 21, 1882. Such title, as passed by that sale, has been conveyed to complainant. An appeal from said judgment was taken to the district court, and on such appeal a judgment was rendered in the district court for the amount recovered below, and subsequent costs. Under this judgment, for the same indebtedness, the property was again sold on October 11, 1883, and such title as passed by this sale has also become vested in complainant. It is insisted that the judgment of the justice of the peace is void, on the ground that it not being a court of record, its jurisdiction must affirmatively appear, and that the record does not show jurisdiction over the person; also, for numerous other reasons. It is also claimed, and if it be so I do not see how the conclusion can be avoided, that the justice's court, not having obtained jurisdiction, the

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appeal from this void judgment could not give the district court jurisdiction, and its judgment is also void. On the other hand, if the justice's judgment and the sale under it be valid, the sale under the district court judgment is claimed to be void because the sale was for a much larger amount than was due, the judgment for the entire indebtedness having been fully satisfied by the sale in the court below. It is also claimed that the judgments and sales upon both judgments are void for many other reasons. The defendant also claims title under another judgment, and sale thereunder, made April 29, 1882, to one Purcell—an older sale than either of those under which complainant claims. If this sale is valid, it cut off defendant's original title before the sales under which complainant holds, and they took nothing by those sales, and the title upon which he relies fails. The title derived under this sale, which was outstanding at the commencement of this suit, has been conveyed to defendant since the suit was commenced. But since it intercepted the very title under which complainant holds, and is the same title upon which he relies, it is just as effectual outstanding as a defense as if it were in the defendant at the institution of the suit, even if, as complainant claims, his objection to the evidence, because not set up by supplemental answer, was sufficiently specific to reject it, which is, at least, doubtful. But the validity of this judgment and sale is also assailed on various grounds. It may well be considered doubtful whether any of these judgments and sales are valid.

The statute of limitations is also relied on by complainant. But that title is disputed by defendant, on the ground that there was no notorious, exclusive, and continued adverse possession by complainant; that the acts of possession were so obscure that defendant was not even aware that complainant was in possession at all, or claimed title. The only evidence of actual possession for the prescribed time, was, going upon the land once, and looking at its boundaries, and afterwards doing the annual hundred dollars' worth of work in tunnels where those doing it were unseen, during that time, for the purpose of not forfeiting complainant's rights, and not rendering the claim liable to relocation. While defendant also claims and introduces testimony

showing, or at least tending to show, that it also did the annual work required by the statute to preserve its rights during the same period for the same purpose, and so was itself in possession; that its possession was better than, or at least as good, as that of complainant. Evidently such a loose, uncertain, scrambling, and mixed possession is not sufficient to vest a title under the statute of limitations.

But the defendant relies upon another defense, and the view we take of it renders it unnecessary for us to decide the numerous other points made, already referred to. On August 5, 1882, defendant filed an application in the proper land office to purchase the premises in question, in pursuance of sections 2325 and 2326, Revised Statutes. The sixty days for publication expired October 7, 1882, and on May 8, 1886, defendant paid for the land, and a certificate of purchase was issued to it. Neither the complainant, nor any of his grantors, before the expiration of the time, or at any time, filed any adverse claim with the register and receiver of the land office. And the statute provides that:—

“If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of four dollars per acre, and that *no adverse claim exists. And thereafter no objection from third parties to the issuance of a patent shall be heard*, except it be shown that the applicant has failed to comply with the terms of this chapter.”

Thus the statute itself makes a proceeding, regularly prosecuted when the period of notice is completed, without the presentation of an adverse claim, absolutely conclusive against all adverse claimants: The proceeding is in the nature of a *proceeding in rem*, and is binding upon all the world so far as any unrepresented adverse claim is concerned. The title, such as it was, good or bad, derived under the constable's sale of July 21, 1882, was an existing adverse claim during the proceedings of defendant for purchase under sections 2325 and 2326 of the Revised Statutes, and was lost by failure to present it. This sale, therefore, valid or void, can afford no grounds for the relief sought.

But complainant insists that his title under the second sale on the judgment on appeal did not exist at the time of the application to purchase, and during the running of the notice, and as complainant and his grantors had no adverse claim at that time they cannot be affected by failure to present one; that he is a successor in interest to defendant, and not an adverse claimant, and, as such, is entitled to the benefit of defendant's application and purchase. Conceding that judgment to be valid, for the purposes of this suit, though I am by no means satisfied that it is, the most that could pass by the sheriff's sale was the then present interest or estate of the defendant. It could not carry any subsequently acquired interest. The then present interest of the defendant was only a mere privilege to purchase, which he might abandon if he chose. •A sheriff's deed can, at most, only have the operation of a quit-claim deed in its strictest sense. It cannot pass an interest which the owner did not have before the sale, but which he subsequently acquires. If the purchase at sheriff's sale was valid, and the purchaser then stepped into the shoes of the execution debtor, it only gave him a right to go on himself, perform the necessary acts to be performed, pay the purchase money himself, contest the rights of other adverse claimants, such as the Northern Belle, make the entry, and upon payment, receive the certificate of purchase. Since that sheriff's sale the complainant has done nothing, but the defendant has itself gone on and procured the title from the United States upon further and new considerations, in which complainant has no interest, and a new and further title to the premises has become vested in defendant. It is a right at law. If complainant has any equities which he might enforce by doing to the defendant such equities as the nature of the case requires, but I do not say that he has, he has not framed his bill upon any such theory. His bill goes upon the theory that he is seised of a legal title already to this mining land, whereas the title derived from the government is vested in the defendant, and it was acquired since the sheriff's sale to complainant's grantors. The defendant having paid the money, defended the suits on adverse claims, and received the certificate of sale, is the owner of the land. The United States has ceased to have any pecuniary interest in

it. They hold the naked, dry, legal title for the holder of the certificate. (*People v. Shearer*, 30 Cal. 648; *Gwynne v. Niswanger*, 15 Ohio, 368; *Astrom v. Hammond*, 3 McLean, 108; *Carroll v. Perry*, 4 McLean, 26; *Ross v. Supervisors*, 12 Wis. 38; *Goodlett v. Smithson*, 5 Port. 246; 30 Am. Dec. 561; *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 218, 219; *Hughes v. United States*, 4 Wall. 232; *Wirth v. Branson*, 98 U. S. 118; *Mining Co. v. Danberg*, 2 Sawy. 455.) This certificate cannot be collaterally assailed, and, as before said, if there are any equities in favor of complainant, they must be presented by a bill framed for and adapted to the purpose.

It is insisted that the certificate was irregularly obtained, and that it is void on that ground, for the reason that there was pending litigation between defendant and other parties to settle the title to the mining ground between them at the time the certificate was issued. Within the time allowed by statute, after the publication of notice, the Northern Belle Mining Company filed an adverse claim, and in due time commenced several suits against the defendant to determine the rights of the respective claimants. These suits were the occasion of the delay in the issue of the certificate to defendant. They were continued along, for some reason, without any active prosecution, for several years. Finally, the defendant, in the absence of any representative of the Northern Belle Mining Company, procured a dismissal of those suits for want of prosecution. After their dismissal, the defendant presented transcripts of the records to the proper land office, showing that fact, and thereupon the purchase money was received from, and the certificate of purchase issued to, the defendant. Afterwards, upon a showing on the part of the Northern Belle Company, the dismissals in the several suits were set aside, and the causes restored to the calendar for further proceedings, and they still remain undetermined. I do not perceive how that condition of things can avail the complainant in this suit. He does not claim under the Northern Belle Company, or in any way connect himself with the rights involved in those suits. He is not in privity with the Northern Belle Company. The title has still passed to the defendant from the United States in a course of proceedings apparently regular, and

it can only be divested in some direct proceeding appropriate to the case. If the Northern Belle should succeed in establishing the superior right in the pending suits, it may be that it will be able to control the title for its own benefit, upon a proper bill in equity against defendant, filed for that purpose. But whether it can or not is no concern of the complainant in this suit. Till divested by some proper proceeding, the right to a patent will remain where it now is.

Conceding the adverse possession to be sufficient to set and keep the statute of limitations in motion, it has not in any event run long enough to be of any avail to cut off the new right vested in defendant under the certificate of entry so recently issued. Indeed, it has not yet begun to run. This suit was commenced on March 29, 1886, and the certificate of entry was issued on May 8, 1886, since the commencement of the suit.

It is objected that this certificate is not available in this suit for the reason that it was not pleaded in the answer. As it was obtained since the commencement of this suit it is insisted that this title should have been set up in a supplemental answer, and as this was not done, it cannot be considered at all. It would, undoubtedly, have been the proper practice to set it up in a supplemental answer. But I am by no means certain that it was absolutely necessary to set it up in order to render it available. The right to the certificate had its inception at the making of the application, but its issue was delayed by the adverse claim and suits by the Northern Belle. When issued, however, the right related back to the time of its inception by making the application, so far as supporting the right of defendant is concerned. But this specific objection was not made at all before the master, nor even in the opening argument of complainant. It was only first presented in complainant's closing argument, in reply to the argument of defendant, wherein this title was earnestly pressed and relied on. The party offering evidence is entitled to have the particular portion of evidence objected to pointed out, and the specific ground of objection stated, in order that he may obviate the objection. (*Satterlee v. Bliss*, 36 Cal. 489, 511; *Cochran v. O'Keefe*, 34 Cal. 554, 558.) Objection that evidence offered is "irrelevant and incompetent" is not sufficiently specific, even in

a criminal case. (*People v. Frank*, 28 Cal. 519.) "Irrelevancy" is too general and insufficient. "The party must state the exact point of his objection." (*Owen v. Finck*, 24 Cal. 177.) The general objection, "irrelevant and incompetent," made before the master, it appears to me, is not sufficiently specific to be entitled to consideration now. The real point of the objection, that the title perfected since the commencement of the suit should have been set up in a supplemental answer, should have been specified. The defendant would then have been able to obviate it by obtaining leave to set it up. But this objection was reserved till the closing argument of the complainant at the final hearing of the case. In my judgment, the failure to call attention to it before the master was a waiver of the objection. When particular grounds of objection are specified, such specification is exclusive, and all grounds not specified are waived. (*Evanston v. Gunn*, 99 U. S. 665; *Belk v. Meagher*, 104 U. S. 279.) "If a general objection to evidence is made, but no ground of objection is specified, the objection will not be considered. If a ground of objection is stated, all grounds not specified are considered waived." (*Fischer v. Neil*, 6 Fed. Rep. 90. See, also, *Wood v. Weimar*, 104 U. S. 795; *Camden v. Doremus*, 3 How. 529; *Burton v. Driggs*, 20 Wall. 133.)

But if wrong in these views, as to the sufficiency of the specification of the objection, or as to waiver, and if necessary to set this title up in the answer in order to make it available, notwithstanding its relation back to its inception, or as showing want of title in complainant, the objection is technical purely. The evidence is all before the court, together with the evidence introduced by complainant to meet and overthrow the defense. It is, therefore, a proper case in which to allow the defendant to amend by setting up this supplemental matter and conform it to the proofs. Time to file such an amendment would undoubtedly have been asked and granted, had the objection been brought to the notice of defendant at any time before the final hearing. To reject it now would be only to entail further litigation in another suit. It would not conduce to the due administration of justice to reject this defense now, when all the means are in the court for doing equity between the parties. (*Neale*

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v. *Neales*, 9 Wall. 1, 8; *Lakin v. Mining Co.* 11 Sawy. 249, 250; 25 Fed. Rep. 337; *Zalin v. Rogers*, 10 Sawy. 208; 21 Fed. Rep. 103, per FIELD, C. J.; *Coghlan v. Stetson*, 19 Fed. Rep. 727.)

The same objection is made in the same way to the title of defendant derived from Purcell by deed made since the commencement of the suit, and the same principles are applicable to that defense. But the sale, if valid, was sufficient to show that the title relied on by complainant had been anticipated and cut off without this deed to defendant. But I think the defendants entitled to set up both their defenses in a supplemental answer so as to avoid all questions as to relevancy, and that the bill must be dismissed.

Let defendant have leave to amend by setting up these supplemental matters before the entry of the final decree, and let there be a decree entered dismissing the bill, with costs.

IN RE MOY CHEE KEE ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

DECEMBER 24, 1887.

1. COSTS.—IN HABEAS CORPUS PROCEEDING—REVISED STATUTES, UNITED STATES, SECTION 828. — An application for a writ of habeas corpus is a proceeding *sui generis*, and the provisions of the Revised Statutes, United States, section 827, regulating the fees of clerks of the circuit and district courts, do not govern in the taxation of costs in such proceedings.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

On application for a writ of habeas corpus. Application to tax costs.

Mr. Thos. D. Riordan and *Mr. L. I. Mowry*, for petitioners.

Mr. John T. Carey, United States Attorney, for the United States.

By the Court, SAWYER, Circuit Judge. The petitioner is a subject of China, of the Mongolian race, who on arriving at the port of San Francisco, on the steamship City of Sydney, from China,

in September, 1887, claimed a right to land under the treaty and laws of the United States. The collector having refused to permit him to land, he sued out a writ of habeas corpus in this court, and, after examination, was discharged by the court. At the time of issuing the writ, the attorney for the petitioner, upon the request of the clerk, as usual in such cases, since January 1, 1887, deposited with the clerk the sum of fifteen dollars, upon the understanding, on the part of the attorney and the clerk, that the fees properly chargeable at the conclusion of the proceeding would be paid out of the deposit, and any surplus remaining returned to him. It was understood by both clerk and counsel that this sum was a *deposit only*, for the purpose indicated. The question as to what amount of fees is properly taxable has never been determined by the courts, and different opinions are entertained on the point by the clerks of the circuit and district courts; and even the attorneys themselves are not fully satisfied on this point. It was their business and duty to present the question for adjudication; but it was, perhaps, from press of business, omitted to be done; consequently, the question as to how much should be taxed in these cases has never before been brought to the attention of the court. The counsel for the petitioner now asks that the costs be taxed by the court, and limited to eleven dollars, and that the remaining four dollars be returned to him as belonging to his client. The clerk is ready and willing to return that amount if eleven dollars is the sum properly taxable, and he can return it without being held responsible for the whole fifteen dollars to the government. The parties now present this case and many similar cases, and request the court to make a proper taxation of the costs, and such order in the case as the rights of the parties require.

The clerks of the two courts, district and circuit, have heretofore supposed that the proper amount to be taxed depends upon the question whether the fees should be taxed under one or the other of two clauses of section 828 of the Revised Statutes, the first clause of which provides fees "for making dockets, and indexes taxing costs on the trial or argument of a cause *where issue is joined and testimony is given*, three dollars;" in this circuit, six dollars. The second clause for doing the same things,

in a cause "where judgment or decree is made or rendered *without issue*, one dollar;" in this circuit, two dollars, which makes a difference of four dollars in the costs properly taxable in each case. The clerk of the district court thinks and acts upon the idea, that the first clause is applicable, while the clerk of the circuit court thinks there is no issue within the meaning of the statutes, and the smaller sum only should be taxed, under the second clause; but for his own protection he receives a deposit of fifteen dollars to cover all costs that may be found taxable, till an authoritative ruling is had upon the point. After a careful consideration of the question, we think that the case does not come under either clause; and, further, that section 828 of the Revised Statutes does not apply to writs of habeas corpus at all. It applies only to the ordinary litigation in the courts in common-law, equity, and admiralty cases, and other ordinary litigation where there are regularly two parties litigating some right between them, and where the prevailing party recovers his costs of his opponent—cases wherein there is a plaintiff and a defendant in the ordinary sense of these terms.

If the petitioner is a plaintiff and the party making the return is a defendant, in the ordinary sense of those terms, and the section is applicable, then the petitioner, when he is discharged, should recover his costs against the party detaining him, and, when remanded, the party to whose custody he is remanded should recover his costs against the petitioner. (Sec. 983, Rev. Stats.) But nothing of this kind has ever been done in any habeas corpus cases of any kind in this or any court, so far as we are aware. Some time ago, in one of the habeas corpus cases arising under the laundry ordinance, where a party held in custody by the sheriff was discharged, his counsel demanded a judgment for costs against the sheriff. Upon examination, the court became satisfied that it was not the practice for the party succeeding to recover costs from his opponent, if opponent he can be called. The court was assured that in the state courts no costs are recovered in such cases.

This class of cases, with respect to fees, is like naturalization cases, *sui generis*, in which the United States supreme court, in a case elaborately considered, recently unanimously decided that

the clerk's fee bill, provided for in section 828, had no application; that this, and other cognate provisions of the statutes, only apply to "ordinary suits between party and party prosecuted in court." It was held that there was no provision prescribing or forbidding fees in naturalization cases, and that the amount was left to be fixed at some reasonable sum in the discretion of the court. (*United States v. Hill*, 120 U. S. 169.)

In our judgment, this case, in regard to the extraordinary writ of habeas corpus, which under ordinary circumstances is seldom invoked, stands upon precisely the same footing. Like naturalization cases, habeas corpus cases are special cases, and are nowhere mentioned in the fee bill. There is no provision authorizing or forbidding the taking of fees in these cases. There is in fact no legal necessity for these cases to come into court at all. The judge can issue the writ, and hear and dispose of the case at chambers, doing the clerical work himself without the intervention of the clerk at all; in which case there would be no fees. This cannot be done in naturalization cases. But, from considerations of convenience, and for the purpose of keeping a record, and the avoidance of so much clerical work on the part of the judge, this course is seldom pursued in habeas corpus cases. Indeed, in this class of cases, it would impose so much non-judicial labor on the judge as to render it impracticable. As the clerk's time, services, and stationery are required in issuing writs, filing returns, swearing witnesses, entering orders and judgments, and making a roll and record, it is but proper that he should be paid by the party requiring those services. There undoubtedly may be cases on habeas corpus where, under peculiar circumstances, it would be proper, and even necessary, for the court to require the performance of this service without compensation. The writ is a writ of right, and parties without means and without fault may find themselves in a position to render it necessary for them to invoke the aid of the writ without charge. But this is not of that class. During this year these cases require more than half the labor, and entail more than one half the expense, on the clerk's offices. The writ is used to enforce a civil right under the treaty and the laws. The parties interested knowingly and voluntarily take the risk when

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they come here, and they should certainly pay the necessary costs in these cases. As there is no statute providing what the fees should be, under the ruling of the supreme court in the case cited, it is competent under the same ruling for the court to fix it at some reasonable sum, which may be in items, or a fixed sum for each case. We know of no better or safer way, than to adopt, by analogy, about the fees for precisely similar service as provided in section 828 of the Revised Statutes. As it is not quite clear which of the two clauses quoted at the commencement of this opinion would govern, were the provisions of that section applicable, and as there is usually but little time occupied in taking testimony in each case, we will adopt, substantially, the one provided for the smallest amount.

Adopting, by analogy, the rates established, the taxable fees will not vary much from eleven dollars. Some may be a little less, and some a little more, but not much either way. And to save the time and trouble of special taxation by items, and the labor of so much book-keeping by items, we will tax the fees in each case brought to a hearing and decision thereon at eleven dollars. In adopting eleven instead of fifteen dollars as the taxable costs, we do not desire to be regarded as in any respect criticising the action of the clerk of the district court in collecting fifteen dollars. There was good ground for doubt upon the construction of the statute, and it was perfectly proper for him, in the absence of any authoritative construction, to be on the safe side, and even if fifteen dollars should be adopted by the district court, instead of eleven dollars, we do not think there would be any reasonable ground for complaint. If we are wrong in the views expressed, that the section of the statute referred to (sec. 828), is inapplicable to this class of cases, still we think the costs should be taxed under the last clause, which would lead to substantially the same result. The proceedings are special and peculiar, and so different from those in ordinary litigation, that all the provisions cannot be literally applied. Like proceedings in naturalization cases, they are *sui generis*, to which the provisions of section 828 do not apply. We can only apply them by analogy; and we think the last clause cited more nearly analogous than the first. As those fees are for official

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service, they are part of the official income of the clerk, as clerk, and, like other fees, are to be accounted for as has been always heretofore done to the government. With the surplus deposited by the consent of parties, and held till the proper amount of fees to be collected should be authoritatively determined, the government has no concern.

It is ordered that the fees in this case be taxed at eleven dollars, and that in all other cases arising in the year 1887, brought to a final hearing and a decision thereon, in which the fees have not yet been finally adjusted with the attorneys, and all such cases hereinafter arising be taxed eleven dollars, and that the clerk, in his returns to the government, in all such cases, account for eleven dollars per case, and that the remainder of the deposits in the hands of the clerk, after paying the sum taxed as costs, be returned to the attorneys for the respective petitioners and owners.

THE UNITED STATES v. WILLIAM H. BARNHART.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 26, 1887.

1. **COMMISSIONER OF THE GENERAL LAND OFFICE — REGULATION BY.** — The regulation of March 13, 1875, made by the commissioner of the general land office concerning the character and quantum of evidence to be furnished the surveyor-general, with selections of land made by the agent of the state, as swamp, under the act of March 12, 1860, is an appropriate regulation of that subject, and until the contrary appears, it is presumed to have been made under the direction and with the sanction of the secretary of the interior, and has the force and effect of law.
2. **FORGED AFFIDAVIT.** — A forged affidavit is within the purview of section 5418 of the Revised Statutes, when it appears therefrom or in connection with extraneous circumstances, alleged in the indictment, that it may be used to defraud the United States, as alleged.
3. **EVIDENCE OF THE CHARACTER OF SWAMP LAND SELECTED BY THE STATE.** — An affidavit may be used as evidence under the regulation of March 13, 1875, to prove the character of lands selected by the state, as swamp and overflowed, under the act of May 12, 1860, whether made before or after such selection; and if made before, and presented to the governor for his consideration in making such selection, the presumption is that he transmitted the same, with the selection to which it relates, to the surveyor-general.
4. **REGULATIONS OF JUNE 30 AND SEPTEMBER 1, 1880.** — The regulations of June 30 and September 1, 1880, by which the land department of the United States, in conjunction with the state, undertook by means of agents in the field to ex-

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amine the character of the lands claimed by the state under the swamp land grant thereto, superseded the regulation of March 13, 1875, and thereafter no affidavit could be legally used before the commissioner or secretary of the interior on the consideration of the question, whether such lands were swamp or not, other than the affidavits of the agents employed to make such examination in the field, and therefore the affidavits alleged in the indictment to have been forged by the defendant could not have been legally used to defraud the United States.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the United States.

Mr. Charles B. Bellinger and *Mr. H. Y. Thompson*, for the defendant.

DEADY J. The indictment in this case was found on April 11, 1887. By it the defendant was accused of violating section 5418 of the Revised Statutes, which provides as follows: "Every person who falsely makes, alters, forges, or counterfeits any . . . affidavit . . . for the purpose of defrauding the United States, or utters or publishes as true any such . . . affidavit . . . for such purpose, knowing the same to be false, forged, or counterfeited, or presents at the office of any officer of the United States any such . . . affidavit . . . knowing the same to be false, forged, altered, or counterfeited for such purpose," shall be punished by imprisonment not more than ten years, or by a fine of not more than one thousand dollars.

The indictment contains three counts. The first one charges the forging, the second the uttering, and the third the transmitting of such an affidavit with intent to defraud the United States.

It is stated in the first count that on April 7, 1875, the commissioner of the general land office made a regulation that the testimony of at least two witnesses would be required to establish the swampy and overflowed character of lands, to be selected by the state of Oregon under the act of Congress granting swamp lands thereto; that prior to September 25, 1884, Henry C. Owen had filed with the proper state board applications to purchase from the state swamp and overflowed lands, to be so selected, that embraced large tracts of land not swamp or overflowed; that on said date the defendant was the agent for Owen to obtain proof in connection with such applications, and then and prior

thereto well knew that they embraced lands not swamp or overflowed; that under the practice permitted by the governor, the defendant was allowed to present to and have considered by the former, affidavits to prove the swampy and overflowed character of lands within the state; that on September 25, 1884, the defendant, intending to defraud the United States, "did falsely make, forge, and counterfeit a certain writing on paper purporting to be an affidavit of D. M. McMenamy and I. L. Poujade," to the effect that a certain list of lands thereto attached, aggregating eight thousand eight hundred acres, and lying and being in township 23 north and range 32½ east, then were and since March 12, 1860, had been swamp and overflowed, and therefore unfit for cultivation.

It is then alleged that this affidavit was so forged by the defendant with intent to defraud the United States of the title and possession of certain of the lands mentioned in said list, which were not on March 12, 1860, nor since, swamp or overflowed lands, but public lands of the United States.

The second count contains the same matter of inducement as the first, and charges that on some day between September 25 and November 11, 1884, the defendant, having said forged affidavit in his possession, did utter the same to the governor of Oregon, well knowing that it was his practice and duty to examine swamp-land proofs and transmit the affidavits in relation thereto to the surveyor-general of the United States for the district of Oregon, which uttering was done by the defendant with intent to defraud the United States of the title and possession of the public lands aforesaid.

The third count repeats the matter of inducement, and charges that on November 11, 1884, the defendant did transmit to the office of the surveyor-general aforesaid said forged affidavit, with intent to defraud the United States of the title and possession of the public lands aforesaid.

The proposition made in support of the demurrer is that it does not appear from anything contained in the indictment that the title of the United States to any of the lands in question could be effected by this affidavit, whether true or false, citing the rule laid down in Hammond's digest, and approved in

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People v. Stearns, 21 Wend. 414, "that how clear soever the fraudulent purpose, unless the writing is sufficient to accomplish that purpose, it is not forgery, since, with a single exception, actions only, and not evil intentions, are punishable by the English law, and actions only which actually do or possibly may produce injustice."

Section 453 of the Revised Statutes authorizes and requires the commissioner of the general land office, under the direction of the secretary of the interior, "to perform all executive duties" respecting the public lands; and section 2478 of the same gives the commissioner authority under the same direction "to enforce and carry into execution by appropriate regulations" every part of title 32 "not otherwise specially provided for." The act of March 12, 1860, making the grant of swamp and overflowed lands to Oregon, is a part of this title.

By a letter dated "Department of the Interior, General Land Office, Washington, D. C., April 7, 1875," and addressed to the "United States Surveyor-General, Eugene, Oregon," the commissioner of the general land office called the attention of that officer to the extract therein contained from a letter of that office to the governor of Oregon, dated March 13, 1875, in regard to swamp lands.

The extract from the letter to the governor prescribes the proof to be furnished of the character of such lands as follows: "When selections are made by the state agents they are to be forwarded to the United States surveyor-general with the evidence of the swampy character of the lands." The regulation then proceeds to specify, at some length, the particulars "the evidence must designate," and concludes: "In short, the evidence should be as full and complete, as if required to establish the character of each tract to the satisfaction of a court or a jury."

The letter to the surveyor-general then proceeds: "On the receipt of such selections you will examine the evidence in support of the swampy character of the land at as early a period as practicable, and report to this office such lands as in your opinion are shown to be swampy or overflowed and rendered thereby unfit for cultivation, together with the evidence presented to

you. You will also forward to the United States land office of the district in which such lands are situated a list of the lands thus shown in your opinion to be swampy, with a certificate stating that satisfactory evidence has been presented to you that said lands are so swampy or overflowed as to render them unfit for cultivation."

By the act of 1878 (Sess. Laws, 41) the governor is appointed land commissioner for the state, and is authorized in person or by an agent "to select" and "locate the lands to which the state is entitled under the laws of the United States," including swamp and overflowed lands. In the discharge of this duty he is required "to prepare accurate lists of the lands by him selected in duplicate, in the manner prescribed by the laws of the United States and the instructions of the commissioner of the general land office; . . . one copy of which he shall forward to the register of the land office in the district where the lands selected are situated; the other shall be deposited with the secretary of state, who shall record the same in a book to be kept for that purpose."

The regulation made by the commissioner concerning the selection of swamp lands in Oregon, under the act of 1860, appears to be appropriate to the execution thereof, and has therefore the force and effect of law. The general land office is a bureau of the department of the interior, and any regulation concerning the disposition of the public lands made by the commissioner and within the scope of his authority is presumed to have been made under the direction and with the sanction of the secretary, until the contrary appears. For all practical purposes such regulation is not only the act of the secretary but of the President, for whom he stands, and is therefore an "executive act," of which the courts take judicial notice. (*Poppe v. Athearn*, 42 Cal. 609; *United States v. Adams*, 11 Sawy. 107; *United States v. Hearing*, 11 Sawy. 318.)

The only national authority for the taking or use of an affidavit in connection with the selection of swamp lands is this regulation made by the commissioner on March 13, 1875. The language of the regulation is: "When selections are made by the state agents, they are to be forwarded to the United States sur-

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veyor-general, with the evidence of the swampy character of the lands."

An affidavit is "evidence" within the meaning of the term as used in this regulation. The testimony of a witness, to be used in the general or local land offices in proof of facts relative to the disposition of the public lands, is commonly taken by affidavit. But the regulation is limited by its terms to "selections made by the state agents." Evidence by affidavit or otherwise, as to the character of lands, is neither required nor authorized, unless the same have been selected by the state, in which case it is to be forwarded to the surveyor-general with the selection, for his opinion and report thereon, to the general land office, as provided in the letter of the commissioner of April 7, 1875.

On this state of law and fact counsel for the defendant insist that it does not appear from the indictment that any of the lands in question had been selected by an agent of the state, at date of this alleged forgery, and therefore the affidavit could not have been used before the surveyor-general as evidence of their swampy character. Or as stated in their brief: "The only affidavits which the surveyor-general is required or authorized to receive or consider, or forward to his superior, and therefore the only affidavits which can possibly aid the alleged fraudulent object, are those which accompany and refer to selections made by the state agents."

The affidavit must have been made, uttered, or transmitted with intent to defraud the United States; and if such intent is not manifest and possible on the face of the writing, extrinsic facts must be stated to make it so. The indictment undertakes to show by the statement of such facts that the tendency of the forgery, and the intent of the defendant in making it, was to defraud the United States of the title to the lands in question; and it must at least appear therefrom that it was possible for the affidavit to have been used so as to produce such a result.

From the passage of the act of 1870 (Sess. Laws, 54), any person over twenty-one years of age who was a citizen of the United States, or who had declared his intention to become such, might become an applicant for the purchase of "any tract or tracts" of swamp land, whether surveyed or unsurveyed, by

filing his application with the governor, who was made land commissioner for such purpose. Twenty per centum of the purchase price—one dollar per acre—was to be paid within ninety days from public notice that the same had been selected by the governor as swamp and overflowed, which he was authorized to do, and the balance on proof of reclamation when a patent from the state was to issue to the applicant. But if final payment and proof of reclamation were not made within ten years from the first payment, the land was to revert to the state.

This act was repealed by the act of 1878, *supra*, and all applications made under it, if not regularly made, or in which the subsequent terms of the act were not complied with, are declared void, while all other applications under the act are recognized as valid and continued in force.

It appears from the indictment that Owen had made application to purchase over eight thousand acres of land from the state as swamp, and that such application was pending on September 25, 1884, when this false affidavit was forged. This application must have been made under the act of 1870, for that of 1878 does not permit a sale of more than three hundred and twenty acres to any one person. The application might have been submitted under either act to the governor for his approval and adoption of the selections therein contained. There is nothing in either of these acts to prevent him from making his selections through the agency of an applicant for purchase, or allowing him to furnish the evidence required by the regulation of the general land office as to the character of the land. The governor was authorized by both acts to employ agents to make the selections, or he might make the selection himself upon evidence procured or obtained in any way he might deem proper and expedient. Certainly it could not have been expected, under the circumstances, that he would go upon the ground and make the selection in person.

I do not think the regulation of March 13, 1875, contemplates or requires, as the argument for the demurrer assumes, that the selection of a tract of land, as swamp, shall be made by the governor or other agent of the state, before the evidence—affidavits—of the witnesses in support of the selection are taken.

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On the contrary there is nothing to prevent the affidavits from being made first, and the selection made by the governor thereafter and thereupon; and every consideration of convenience points to this mode of proceeding. Indeed, the governor could not make a selection in his office without the proof before him of the swampy character of the land; and knowing what proof the land department of the United States required, before the selection would be adopted thereby, he would naturally and properly, and in the line of his duty, require the same to be presented to him, and thereafter transmit it with the selection to the surveyor-general.

Now, it appears from the indictment that the defendant, under the method of practice adopted by the governor, was permitted to present and have considered by him, affidavits, to prove the swampy and overflowed character of lands within this state. Under these circumstances it is alleged in the indictment that the defendant presented the affidavit in question to the governor for his consideration in determining the character of the lands contained in the Owen application. Assuming what the demurrer admits, that the affidavit was forged by the defendant, with intent to defraud the United States of the title to a considerable portion of the lands therein mentioned, which are not and never were swamp or overflowed, could the same have been legally used so as to produce, or aid in producing such result? On this statement of the case the question must be answered in the affirmative. If the governor found the lands were swamp and overflowed within the meaning of the act of March 12, 1860, as it must be presumed he would on such evidence, he would approve the selection and forward the same to the surveyor-general with the evidence—the affidavit—who would in turn report the same to the general land office with his opinion thereon, and if the forgery was not detected in all probability the fraud would prove successful.

The affidavit was evidently drawn with the regulation of March 13, 1875, in view. It contains all the particulars concerning the character and condition of the lands thereby required. And if genuine it might legally be used to enable the governor to select the lands therein mentioned as swamp and overflowed;

and also as evidence of such fact in the land department of the United States.

And so the case made in the indictment comes fully within the rule cited by counsel for the defendant from the *People v. Stearns*, 21 Wend. 414. "The writing is sufficient to accomplish the purpose, to defraud the United States of the title to the lands in question—" and it is sufficient if it "possibly may produce" such a result.

The consideration of the demurrer to the first count disposes of it as to the second and third ones.

Assuming, what the demurrer admits, that the defendant knowingly uttered such false affidavit, as true, for the purpose of defrauding the United States of certain lands, when he delivered the same to the governor, as evidence of their swampy character, and thereafter by such means intentionally transmitted the same to the surveyor-general for a like purpose, a case under the statute is made in each of said counts, the one of knowingly uttering or publishing the forgery, and the other of transmitting the same to an officer of the United States, with intent to defraud.

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DEADY, J. Upon the delivery of the foregoing opinion leave was given, on the application of counsel for the defendant, to re-argue the case, which was done on January 3, 1888.

On this argument counsel for the defendant contended that the regulation of March 3, 1875, providing that when selections of swamp land are made by an agent of the state, they must be forwarded to the department through the office of the surveyor-general, with the evidence of their swampy character, was superseded and set aside before September 25, 1884, the date of the forged affidavit, by the instructions of the commissioners to agent R. V. Ankenny of June 30 and September 1, 1880, made in pursuance of an agreement with the governor of the state, by which the proof of the swampy character of all lands claimed by the state under the swamp-land grant was to be furnished by the affidavits of the department and state agents, who might examine the same in the field.

The conclusion reached on the first hearing, that the affidavit

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in question might lawfully have been used to defraud the United States of the title to certain lands, is founded on the assumption that the regulation of March 13, 1875, was then in force and had the effect of law. Without it, it was not contended there was any case against the defendant, for with whatever intention the affidavit was made, but for this or some similar regulation, making it legal evidence before the United States land department of the swampy character of the lands therein referred to, it could not be lawfully used for such purpose.

After a somewhat extended examination of the subject among the sources of information within my reach, the regulations of the land department applicable to the matter appear to be as follows:—

Soon after the passage of the swamp-land act of September 28, 1850, to wit, on November 21st of that same year, the commissioner issued a circular to the governors of the states, to which the grant applied, allowing them to elect which of two methods they would adopt for the purpose of designating the swamp lands within the limits of their respective states, namely, the field notes of the United States surveys or selections made by the agent of the state, to be reported to the surveyor-general, with proof of the character of the same.

This option was also offered to this state after the grant had been extended here by the act of March 12, 1860. By the act of October 26, 1870 (Sess. Laws, 54), Oregon elected to select the lands, and authorized the governor to make the selections in person or by agents appointed for that purpose. Selections were made in this way until 1880, when, at the suggestion of the governor of the state, the commissioner appointed R. V. Ankenny to examine in the field the lands claimed by the state, which had not been passed on by the department, and directed him to confer with the state authorities and to act with any agent they might appoint. Ankenny was also instructed to transmit to the commissioner lists of the tracts concerning which he and the state agent agreed, "with testimony touching the character of said tracts"; and in case of disagreement between them Ankenny was to report his opinion of the tract "with like testimony."

The governor appointed Charles Whiteaker as agent for the

state. On September 1, 1880, the commissioner, in response to a communication from Ankenny, of August 4th, instructed him that he and the state agent were jointly to examine the lands claimed by the state as swamp, "and make out lists of such tracts and attach their affidavits thereto, setting forth the facts relative to your examination of the lands and the character of the same. Said affidavits are what was referred to in your instructions as 'testimony.'"

Thereupon the agent of the department and the state began the examination in the field of the land claimed by the state, and made reports thereon as provided in the instructions. And this method was, and still is, pursued in the examination and proof of the character of the lands claimed by the state under the grant of March 12, 1860, the commissioner, under the direction of the secretary of the interior, approving the selection or refusing to do so, on the information contained in the affidavits of these agents, and in case of a disagreement by reference to the field notes of the United States surveys.

On January 24, 1885 (3 Dec. L. D. 334), acting secretary Joslyn decided on appeal from the decision of the commissioner, rejecting the claim of the state to about forty-eight thousand acres of land, on the report and affidavits of these agents that they were not swamp or overflowed, that the arrangement between the department and the state, which resulted in the appointment of agents to examine the lands in the field, was binding on the latter, and that under it the testimony of no witness could be introduced to prove the character of the land, other than that of these agents. This decision was subsequently, March 3, 1885, affirmed by Secretary Teller (3 Dec. L. D. 467), and by acting secretary Muldrow, June 19, 1885 (Dec. L. D. 595); and lastly by Secretary Lamar, August 7, 1886. (5 Dec. L. D. 31.)

On January 29, 1881, the governor of the state wrote to the commissioner and stated that the appointment of the "agent to examine in the field, lands claimed by the state under the swamp-land grant" was done "in pursuance of a request from" his office, and "that the system thus adopted," in his opinion, "will prove highly successful." After speaking of the appointment of the state agent, Whiteaker, to co-operate with Ankenny, the

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agent of the department, he further states that he is very anxious that the system "be continued"; and that he has learned that the agent of the department "has received instructions . . . to examine no lands except lists furnished from" the office of the commissioner.

He then says: "The mode formerly pursued was to file lists claimed by the governor as swamp lands with the surveyor-general of Oregon, with proof of their swampy character, who, if he approved the same, forwarded them to your office for confirmation. Under the present system the former mode could be well dispensed with, in my judgment, and the governor allowed to forward the lists in the first instance to your office, and without any proof of the swampy character of the land claimed. You will no doubt agree with me that proofs in the form of *ex parte* affidavits are of the most unsatisfactory kind, and that such proofs are wholly unnecessary, when the agent examines the land personally. There is a large amount of swamp lands in the state, some of which have been claimed and the lists filed in the office of the surveyor-general of Oregon, and which have not been forwarded on account of a defect of proof, and others have been returned to this office. In view of these circumstances, I have caused lists to be made of all these lands, and herewith forwarded them to you, trusting that you will allow them to be filed in your office, and forward copies to General Ankenny, with instructions to examine and report as to the character of the lands included in such lists, and that you will permit me to forward other lists of a like character from time to time, as they may be returned to me by agents appointed on the part of the state, to examine lands and return lists of those they believe to be swamp and overflowed within the meaning of the swamp-land grant. By this means the work of segregation can be kept moving forward until the state shall receive the full benefit of the grant."

But notwithstanding the adoption of the new system of ascertaining the character of the lands claimed by the state, and the decision of department that the testimony of no other persons than the agents who made the examination in the field could be used as evidence before the commissioner or secretary in the

determination of the question whether lands claimed by the state are in fact swamp; and notwithstanding the governor proposed to and actually did forward lists of state selections directly to the office of the commissioner, without any affidavits as to their swampy character; still, it appears from the files of the surveyor-general's office that the practice of sending the lists of state selections through such office, with affidavits as to their swampy character, was resumed and continued by the executive of the state. Indeed, the affidavits in question appear to have been so forwarded by the governor with the list of lands to which they relate, and by the surveyor-general transmitted to the office of the commissioner, from whence they were returned here, to be used as evidence in this case. And as late as July 20, 1887, the governor forwarded to the surveyor-general two lists of state selections, containing 3,694.69 acres, with the affidavits of two persons as "proof of their swampy character." On September 27th, the surveyor-general forwarded the same to the commissioner for his action, and at the same time certified that he had "compared the area of the tracts shown on the lists with the areas shown on the original plats of surveys on file" in his office, and that in the few instances in which they did not agree, he had made "the necessary corrections . . . on the margin of the lists;" and on October 6th, the commissioner acknowledged the receipt of the lists and proof.

On September 14, 1887, acting commissioner Stockslager, in response to a letter from the surveyor-general, wrote him that the "instructions" required him to examine the evidence furnished with the lists of lands filed in his office, to show their character, and forward to that office a list of such tracts as he may find to be swamp, within the meaning of the grant, together with the evidence in support thereof.

In this state of apparent confusion and contradiction of instruction, decision, and practice on this subject in the land department, it may be admitted that the affidavits in question and others like them have been used since 1880 to verify the claim of the state to tracts of land selected by its agents under the swamp-land grant, so as to entitle the lists thereof to be filed in the office of the surveyor-general and there examined

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and compared with the original plats of surveys, for quantity, preparatory to being transmitted to the office of the commissioner for the action and consideration of the department.

That there is any real necessity for these affidavits in this connection is not apparent. As was suggested in the executive communication of January 29, 1881, they are a very unsatisfactory kind of evidence at best. The affidavits being in due form and containing the stereotyped statements as to the character of the land, the action of the surveyor-general thereon is the merest empty formality. Assuming, as he must, that the affiants, whoever they may be and however irresponsible they are, speak the truth, he can but pass the list to the department as containing swamp land.

Under the circumstances, the official claim of the executive of the state that certain lands selected by its agents under the swamp-land grant are swamp, ought to be a sufficient verification of the fact to entitle the list thereof to be filed in the office of the surveyor-general for comparison, as to quantity, and transmission to the commissioner for the action and consideration of the department. And any evidence which may be submitted or used by the governor in preparing these lists and this claim on behalf of the state ought to be considered a matter solely pertaining to his office, and remain there.

But be this as it may, it must be admitted that under the regulations of the commissioner as construed by himself and the secretary, the affidavit in question could not when made, nor since 1880, have been used as evidence before either of those officers in the investigation or determination of the question, whether the lands to which it relates are swamp or not. And unless it could have been so used, it could not be used to defraud the United States of its title to such lands, as alleged in the indictment.

It is true, the affidavit might have been used, and so far as appears was used, to influence the action of the surveyor-general; but the action of that officer was only preliminary to the presentation of the claim of the state to the department for investigation and determination, and had no effect whatever on the title of the United States to the lands in question. Admitting, as

the demurrer does, that the defendant, as charged in the third count, transmitted this affidavit to the surveyor-general by the hands of the governor, with the intent to defraud the United States of the title to these lands, still it must be sustained, unless any action which that officer might lawfully take thereon would have the effect to defraud the United States as alleged, or materially aid in so doing. His action alone could not possibly have such effect, for he had no power over the question on which the title depended or the evidence on which it was to be determined.

Nor, in my judgment, could such action have materially aided in producing such a result. Based on this affidavit in part, the surveyor-general might, and probably did, transmit the claim of the state to the list of lands to which it was attached, to the commissioner for final disposition. The affidavit was then *functus officio*, and the title to the land was wholly unaffected by it. The United States could not be deprived of it except by the judgment of the secretary of the interior, based on the evidence or information contained in the affidavits of the agents who examined the lands in the field.

For these reasons I am constrained to change the ruling on the demurrer to the indictment, and it is now sustained.

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DEADY, J. The defendant is accused by the indictments in these three cases of forging, uttering, and transmitting two other affidavits purporting to be those of said McMenamy and Poujade, and another purporting to be that of D. A. Lambert and S. R. Jones, for the purpose of defrauding the United States of the title to certain lands therein mentioned. The cases were submitted on demurrers to the indictments with the foregoing one. The case made in the indictments and the questions raised on the demurrers are the same as in the foregoing case, and the same disposition is made of them.

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THE UNITED STATES v. MARTIN McCONAUGHY.

DISTRICT COURT, DISTRICT OF OREGON.

DECEMBER 29, 1887.

1. PERJURY.—In an indictment for perjury, it must distinctly appear that the defendant was sworn.
2. DEPOSE AND SWEAR.—An allegation that the defendant did “depose and swear” to the truth of the answers contained in the deposition following, does not show that the defendant was “sworn” to the truth of said answers.
3. SWEAR AND SWORN.—One may “swear” who is not “sworn”; and in such case the oath is not administered, but self-imposed, and the swearer incurs no legal liability thereabout.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the United States.*Mr. Cyrus A. Dolph*, for the defendants.

DEADY, J. The indictment in this case was filed April 5, 1887, and charges the defendant with the crime of perjury, committed on August 19, 1885, in a deposition given before the register and receiver of the United States land office for the Lake-view land district, in making the final proof in the matter of his desert-land entry in said district under the act of March 3, 1877. (19 Stats. 377.)

The defendant demurs to the indictment, for that, (1) the same does not state facts sufficient to constitute a crime against the United States; and (2) the court has no jurisdiction of the subject-matter.

On the argument the only point made by counsel for the demurrer is, that the indictment does not show that the defendant was sworn.

After stating the pendency of the proceeding before the register and receiver, the indictment alleges that the defendant offered himself as a witness therein on his own behalf, and “did subscribe his name to a deposition in the words and figures following: (Here follows the deposition with a certificate of the receiver thereto that the same was subscribed and sworn to before me this nineteenth day of August, 1885.)” The indictment then alleges that the defendant did, in said proceeding, wilfully and

corruptly “depose and swear” that the answers which he had made to the questions in said deposition contained were, to the best of his knowledge and belief, true; that the “said oath” in said proceeding “taken as aforesaid,” by said defendant, “was then and there duly administered” to him by said register and receiver.

In an indictment for perjury it must be directly stated in some form of apt words that the defendant was sworn. It is not sufficient that it so appears by inference or argument. (1 Whart. Crim. Law, sec. 1287; 2 Bish. C. P. sec. 912; *State v. Divoll*, 44 N. H. 142.)

The indictment in this case only alleges that the defendant did “depose and swear.” All that is subsequently said about “said oath,” and the taking and administering of the same, refers to the allegation “did depose and swear,” and adds nothing to its signification or effect. The case in this respect is nearly on all fours with that of the *United States v. Hearing*, 11 Sawy. 521. In that case the defendant was indicted for perjury in making a homestead affidavit, which was set out in the indictment. This was followed by an allegation that the defendant did, before a person authorized to administer “said oath,” depose and state contrary to his *said oath*.

In sustaining a demurrer to the indictment the court said, that after setting out the affidavit there should have been an allegation, “that the defendant being then and there duly sworn by the clerk, etc., did depose and state that said affidavit was true;” and that the allegation, that the defendant did depose and state contrary to his said oath is, if anything, an attempt to assign perjury on a “said” or supposed oath, the administration of which is nowhere alleged. But the fact that the defendant was sworn must be distinctly stated. It is not sufficient that it appears by implication.

In this case it is true that the indictment states that the defendant did “depose and swear” as in the deposition already set forth. But this is by no means the equivalent of the sufficient allegation, “being duly sworn did depose and say.” To “depose” is merely to state or affirm some matter of fact in an affidavit or deposition. And this may be done as well before

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an oath is administered to the deponent as afterwards. In this case it appears that it was administered to the witness after he had deposed.

One may "swear" who is not duly "sworn." In one case the oath, so to speak, is self-imposed, and the swearer incurs no legal liability thereby, while in the other the oath is administered by a person having authority so to do, and the affiant takes it subject to the pains and penalties for perjury.

It is hardly necessary to add that the statement in the jurat that the deposition "was subscribed and sworn to before" the receiver is not an allegation to that effect, but merely a recital from the receiver's certificate.

And it may be well to suggest that this certificate does not state in words, that the defendant subscribed and swore to the deposition, even if it does so by implication.

The demurrer is sustained.

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SAME v. T. A. HENDERSON.

DEADY, J. These two cases were argued and submitted with the foregoing. The defendants are each indicted for perjury alleged to have been committed in depositions given by them as witnesses, in the matter of the final proof of Martin McConaughy's desert-land entry. The demurrers to the indictments are sustained on the ground that it does not appear therefrom that the defendants were duly sworn.

THE UNITED STATES v. KEE HO AND LEE ARK:

DISTRICT COURT, DISTRICT OF OREGON.

DECEMBER 31, 1887.

1. **INDICTMENT—DESCRIPTION OF CRIME THEREIN.**—It is not sufficient in an indictment under section 3062 of the Revised Statutes to charge the defendant, in the language of the statute, with importing merchandise into the United States "contrary to law," or with having received or bought the same, after being so imported; but the indictment must state with reasonable certainty in what the illegality of the importation consists,

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[December,

2. **IMPORTATION CONTRARY TO LAW.**—The offense of bringing merchandise into the United States “contrary to law,” as defined by section 3082 of the Revised Statutes, does not include frauds or illegalities concerning the invoicing of the same or the payment of duties thereon, which can only occur after the importation is accomplished and the merchandise brought within the cognizance of the custom officers.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the United States.

Mr. Rufus Mallory, for the defendants.

DEADY, J. The indictment in this case is found under section 3082 of the Revised Statutes, the same being section 4 of the act of July 18, 1886 (14 Stats. 179), entitled “An act further to prevent smuggling and for other purposes.” It provides that “if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both.”

The indictment contains five counts; and the merchandise alleged to have been illegally imported consists of one hundred and sixty-one packages of prepared opium, of the value of one thousand four hundred and ninety dollars.

The first count charges the defendants with importing and bringing the opium into the United States on May 6, 1887, with intent to defraud the revenue thereof. It is alleged that the opium was “subject to duty by law” and “should have been invoiced,” and was imported “without paying or accounting for the duty due and payable” thereon, contrary to the statute in such cases made and provided.

The second count charges the defendants with receiving the opium from some person to the grand jurors unknown, knowing the same to have been imported contrary to law.

The third one charges them with buying the same from such unknown person with the like knowledge.

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The fourth one charges the same offense as the second one, with the additional allegations that the opium had been theretofore imported contrary to law, and “without paying or accounting for the duty due and payable thereon.”

The fifth one is similar to the third one, with the addition of the allegations concerning the importation of the opium and the non-payment of the duty thereon, as in the fourth one.

The defendants demur to the first count in the indictment, and the remaining four counts, separately, for that neither of them “charge a crime against said defendants, or either of them.”

It is not always sufficient to state an offense in the language of the statute declaring or defining it. Unless the statute distinguishes or individuates the offense, so that the defendant is notified by its terms of what he is really to be tried for, it is not sufficient to follow its language, in drawing an indictment under it. (Whart. Cr. P. & P. sec. 220; *United States v. Simmons*, 96 U. S. 360.) In this case it was held that an indictment drawn under section 3266 of the Revised Statutes, in which the crime was described in the language thereof, was insufficient. In delivering the opinion of the court, Mr. Justice Harlan, after stating the general rule to be, that it is sufficient to charge the defendant “in the substantial words of the statute, without any further expansion of the matter,” said (p. 362): “But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.”

The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling—the clandestine introduction of goods into the United States without passing them through the custom-house, and with intent to defraud the revenue of the United States.

But its language is broad enough to include and does include every case or form of illegal importation, even where the intent

to avoid the payment of duties does not exist, as the bringing in of prohibited goods or goods packed in prohibited methods.

The language of the section, "import contrary to law," is very general, and does not indicate or individuate any one of the various illegal importations that come within its scope and operation. And therefore it becomes necessary, in charging a crime under the section, to state in the indictment in what the illegality of the importation or bringing into the United States consists; and unless this is done no particular crime is charged and the indictment is demurrable. See *United States v. Thomas*, 4 Ben. 370; *United States v. Clafin*, 13 Blatchf. 186, in each of which cases a demurrer was sustained to an indictment under this section on this ground.

Nor does the statement in the latter part of the count, to the effect that the opium is dutiable and should have been invoiced and the duty was not paid thereon, help the case in any respect.

The offense of bringing merchandise into the United States "contrary to law" does not include frauds or illegalities concerning the invoicing of the same, or the payment of duties thereon, which can only occur after the importation is accomplished and the merchandise brought within the cognizance of the custom officers. (*United States v. Clafin*, 13 Blatchf. 184.)

This allegation is immaterial and must be treated as surplusage. The demurrer to the count is sustained.

In the consideration of the demurrer to the remaining counts in the indictment the fourth and fifth ones will be regarded in this respect as mere repetitions of the second and third ones. The statement in the former, concerning the non-payment of duties in the description of the original offense of importing the opium, being no part of such offense and therefore immaterial, both the second and fourth counts alike charge the defendants with the commission of the secondary offense of receiving the opium knowing it to have been imported or brought into the United States contrary to law, while the third and fourth counts charge them with buying the opium under similar circumstances.

In a count charging the secondary offense of buying or receiving goods imported contrary to law, it is not necessary to describe the original offense with the same particularity of time, place,

and circumstance that is required in a count for such original offense. The rule in the case of an indictment for receiving stolen goods furnishes a safe analogy. In such case it is not necessary to name the thief, nor to allege his conviction, nor to state the time and place, when and where the goods were stolen; and generally it is sufficient to describe the goods, state their value, and allege that before the receipt thereof by the defendant they had been stolen or feloniously taken and carried away. (*United States v. Claffin*, 13 Blatchf. 182; 1 Whart. Crim. Law, secs. 997–1004.)

The defendants are charged in these four counts with receiving and buying this opium, knowing the same to have been imported into the United States contrary to law. The fact that such merchandise was so imported is not, however, alleged in either the second or third count, as it should be. And it only inferentially or argumentatively appears from the allegation that the defendants knew that the opium was imported contrary to law. But the fact is directly alleged in the fourth and fifth counts; and is this a sufficient designation or description of the original offense, even in a count for the secondary offense of buying or receiving?

In my judgment it is not. The indictment ought to state as to these offenses, wherein the importation was illegal or contrary to law, whether the opium was smuggled into the United States or brought here, whether through the custom-house or not, contrary to a statute prohibiting its introduction into the country, or in prohibited packages or condition. Hitherto, it may be said that the law permitted the importation of opium without restraint, as to quantity, package, or condition, and therefore an allegation that such an article was imported contrary to law necessarily implied, and must in law be held and taken to mean, that it was smuggled.

This conclusion may be within judicial knowledge, but I hardly think it ought to be imputed to that of the defendants, in this or any case, or excuse the prosecution from stating substantially in what the illegality of the importation in question consists, so that the defendant may be prepared to meet the charge on the trial.

Points decided.

[January,

But since the passage of the act of February 23, 1887 (24 Stats. 409), entitled "An act to provide for the execution of the provisions of article 2 of the treaty" with the emperor of China of November 17, 1880, this right is so restrained that it is now unlawful for any "subject of the emperor of China" to import opium into any port of the United States. Therefore the illegality of this importation of opium may consist in the fact that it was smuggled or that it was imported by a Chinese subject, even if it came through the custom-house and paid duty, and the indictment ought to show on which of these illegalities, if either, the prosecution relies.

The demurrer to the counts for receiving and buying is also sustained.

R. F. McCONAUGHY v. J. M. WILEY.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 16, 1888.

1. ACTION TO RECOVER CHATTELS SEVERED FROM THE REALTY AGAINST ONE IN POSSESSION OF THE LATTER.—The vendee of land sold by the state as swamp, the same not having been designated as such by the secretary of the interior, under the swamp-land grant to the state of March 12, 1860, cannot maintain an action to recover the possession of hay cut thereon against one in the actual possession of that portion of the premises on which the hay was cut, for the purpose and with the intention of acquiring the title to the same under the pre-emption acts as being dry and fit for cultivation.
2. VENDEE OF SWAMP LAND SOLD BY THE STATE AS SWAMP—WHEN MAY MAINTAIN EJECTMENT AND REPLEVIN.—A purchaser from the state of land selected by it as swamp, on making the first payment thereon and receiving the receipt or certificate therefor, is entitled, if the land is in fact swamp, or has been so designated by the secretary of the interior, to the possession of the same and the vegetation growing thereon, and may maintain an action to recover such possession.

Before DEADY, District Judge.

Mr. Rufus Mallory and *Mr. Charles B. Bellinger*, for the plaintiff.

Mr. George H. Williams and *Mr. George H. Durham*, for the defendant, with whom appeared *Mr. Lewis L. McArthur*, United States District Attorney.

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DEADY J. This action is brought by the plaintiff, a citizen of California, to recover possession of two hundred tons of hay alleged to have been wrongfully cut by the defendant, a citizen of Oregon, on the land of the plaintiff.

It is alleged in the complaint, that the plaintiff is the owner and in possession of a certain one hundred and sixty acres of swamp lands, situated in Lake County, Oregon, and that the defendant, on or about July 6, 1886, wrongfully and with force entered on such land and cut two hundred tons of hay thereon, the property of the plaintiff, and took the same and stacked it on the premises, to the damage of the plaintiff eight hundred dollars.

The plaintiff made an affidavit for the immediate delivery of the property as provided in title 14 of the Code of Civil Procedure, in pursuance of which, on December 22, 1886, the marshal took one hundred and fifty tons of said hay, that being all he could find, and delivered the same to the plaintiff.

The answer of the defendant, filed on January 8, 1887, contains denials of certain material allegations of the complaint, not necessary now to notice, and also a *defense*, which is denominated therein, "a further and separate answer."

The defense is to the effect that on May 28, 1885, and since, the defendant was and is qualified to become a settler on the public lands, under the pre-emption laws of the United States, and that being so qualified, he, on said day, peaceably entered into the possession of said land, which was then vacant and unsurveyed public land of the United States; that in said year he erected a dwelling-house thereon, in which he has since resided with his family, and has expended about fifteen hundred dollars in improving the same; that he settled on said land for the purpose of acquiring the title thereto under the pre-emption laws of the United States, as soon as he could, and that he has done all that could be done to obtain such title; and that said hay was cut and stacked on said land by the defendant in 1886, while he was in the possession thereof as aforesaid. The answer also asks judgment for the return of the hay or the value of the same—eight hundred dollars—with damages for the detention thereof.

To this defense the plaintiff replies, and denies that the entry of the defendant was peaceable, or that the land was then vacant and public land of the United States.

On the argument counsel for the defendant made three points against the plaintiff's right to recover the possession of the hay in this action. (1) Admitting the land to be swamp, the plaintiff has neither the title nor the right of possession. (2) Admitting that the plaintiff has such title and right, he cannot maintain this action, because the defendant was in the adverse possession of the premises when the hay was cut. And (3) the land is not in fact swamp. From a stipulation filed in the case, it appears that on January 1, 1883, a deed was duly executed by the proper officers, under the statutes applicable to the selection and sale of swamp lands by the state, conveying to the plaintiff certain lands, as swamp; and that on April 3, 1884, a certificate of sale numbered 144 was in like manner issued to Henry C. Owen for eight hundred acres of land, as swamp, which deed and certificate were "legally sufficient to convey such title as the state could lawfully convey;" that afterwards the plaintiff duly acquired Owen's interest under said certificate in a portion of the lands therein mentioned; that the plaintiff, at all the times mentioned in the pleadings herein, had "all the right and title" in and to said lands which could pass by said deed and certificate; and that the land on which the hay mentioned in the complaint was cut is included in said certificate or deed from the state.

By the act of October 26, 1870 (Sess. Laws, 54), provision was made for the selection and sale, at one dollar per acre, of the swamp and overflowed lands granted to the state of Oregon by the act of March 12, 1860. The selection was to be made in the field under the direction of the governor, who was to have maps of the same filed in the clerk's office of each county where the lands were located, and give public notice thereof. Any person over the age of twenty-one years who was a citizen of the United States, or had declared his intention to become such, might apply to the governor to purchase any "tract or tracts" of said land, designating the same by the surveys, and in case there was no surveys, by "artificial or natural landmarks."

Within ninety days from the publication of the notice afore-

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said the applicant to purchase was required to pay over twenty per centum of the purchase money to the state, for which "a receipt" was issued to him, and at any time within ten years thereafter, on proof that the land was "drained or otherwise made fit for cultivation," and the payment of the balance of the purchase money on the land actually reclaimed, he is entitled to "a patent for the land so reclaimed"; but where "no such proof of reclamation and payment" is made within said period, the land "shall revert to the state and the money paid thereon shall be forfeited." A successful cultivation of swamp land for three years "in either grass, cereals, or vegetables" is made by the act a sufficient reclamation.

By the act of October 18, 1878 (Sess. Laws, 41), the swamp lands were still selected under the direction of the governor, but the power to sell was given to the commissioners for the sale of school lands, namely, the governor, secretary, and treasurer of state, and the quantity which any one person might purchase was limited to three hundred and twenty acres.

Section 9 of the act provides: "All applications for the purchase of swamp . . . lands made previous to the passage of this act, which have not been regularly made in accordance with law, or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void, and of no force and effect whatever."

Section 10 provides that when such applications "have been regularly made" and "fully complied with," the applicant shall, on payment of two dollars and fifty cents per acre for such lands prior to January 1, 1880, receive a conveyance therefor, "without proof of reclamation"; but if he refuses to purchase the entire tract applied for, he shall only be allowed to purchase three hundred and twenty acres thereof.

The "certificate" mentioned in this case is the "receipt" spoken of in the act of 1870. In addition to the mere fact of the payment of the money, it states on what account it was paid and the general nature and effect of the transaction, measured by the statute under which the purchase and payment were made.

The right to insert these matters in the receipt has been questioned, but I do not think the authority of the commissioners was exceeded in so doing. In this way the receipt is made to show for the benefit of whom it may concern, the nature of the transaction in which the payment is made, and the right and obligation resulting therefrom.

Briefly, these two sections of the act of 1878 provide for the forfeiture of the right acquired under the act of 1870, not only for a failure to comply with the conditions subsequent to the sale or issue of "the receipt," but also for a failure to comply with the condition precedent to the right to purchase. These conditions subsequent were the proof of reclamation, and the payment of the balance of the purchase money within ten years from the payment of the twenty per centum thereof, and the condition precedent was the payment of such per centum within ninety days from the publication of notice by the governor of the filing of the swamp-land maps in the county where the lands were located.

Section 1 of the act of February 16, 1887 (Sess. Laws, 9), declares void all certificates of sale of swamp lands "on which the twenty per centum of the purchase price was not paid prior to January 17, 1879;" and section 2 of the act declares forfeited all swamp lands sold under the act of 1870, in case of a failure to comply with the subsequent conditions, as was already done by section 9 of the act of 1878. The first section of this act, if allowed unqualified operation, may be obnoxious to the clause in the national constitution (Art. 1 sec. 10), prohibiting a state from passing any "law impairing the obligation of contracts."

An applicant for the purchase of swamp lands under the act of 1870 had a contract with the state to that effect, from the time of filing his application. If, thereafter, he failed to pay the twenty per centum of the purchase price within the time or under the circumstances prescribed by law, the state might rescind the contract or treat it as abandoned. But there was no statute prior to the one of 1878 that attached any specific consequence to such failure, or annulled or rescinded the contract therefor. Under these circumstances, if the officers of the state charged with the duty of disposing of these lands accepted the twenty per centum after the day on which it became due and

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payable, and issued a certificate to the purchaser prior to October 17, 1878, I do not think the legislature could afterwards annul the contract and declare the certificate void, because the payment was not made on the day appointed. Payment after the day, if accepted, discharges the debt or obligation the same as if paid at the day. (*United States v. Gurney*, 4 Cranch, 333.)

Again, if an application was made for the purchase of swamp land under the act of 1870, at any time prior to the passage of the act of 1878, and the twenty per centum of the purchase price was paid within ninety days following the publication of the notice of the filing of the map thereof, in the county where the land was located, but owing to the delay in filing said map the payment was not made "prior to January 1, 1879," the legislature could not declare the certificate of sale issued on such payment void and of no effect. For the payment, if made within ninety days after the publication of the notice of the filing of the map, is made within the terms of the contract of purchase with the state, no difference whether made before or after "January 1, 1879."

It does not directly appear under what statute this certificate was issued or deed made. But as it is admitted that they each include more than three hundred and twenty acres of land, the applications must have been made prior to the act of 1878, and under the act of 1870. As shown by the foregoing exposition of the swamp-land acts the payments in each case may have been made within the time allowed by law; and in the absence of evidence to the contrary, the presumption is that they were, and that the certificate and deed were legally issued and made. Until the contrary appears, official duty is presumed to have been regularly performed. Besides, the stipulation in the case admits that the deed and certificate were "legally sufficient to convey such title as the state could lawfully convey," and that the plaintiff has "all the right and title" which thereby passed. Assuming, then, for the time being, that the land described in these writings is swamp, the plaintiff is undoubtedly the legal owner of that described in the deed, and as such, may maintain ejectment, trespass, or replevin, as the case may be.

The purchaser, after obtaining his certificate or receipt, is

certainly entitled to the possession of the land. Without it how can he reclaim and cultivate the same, as required by the contract of purchase? In effect, the interest of the state in the land passes to the purchaser, who holds the same subject to the performance of the conditions of reclamation and final payment, on failure of which the statute declares the land "shall revert to the state." This, in my judgment, gives the plaintiff such an interest in the land as will enable him to maintain ejectment for the possession or replevin for hay cut thereon by a trespasser or intruder.

It does not appear, however, that the secretary of the interior has ever passed on the question of whether this land is swamp, and therefore the purchaser from the state takes subject to his determination of the question, which is final. But in the mean time, and until the action of the secretary is had in the matter, the purchaser from the state may maintain his right to the possession against any adverse claimant, by showing that the land is in fact swamp within the intent and purpose of the grant to the state. (*Wright v. Roseberry*, 121 U. S. 488.)

The next question is, can the plaintiff, under the circumstances, maintain this action against the defendant for the recovery of the hay? The rule is stated by Mr. Justice FIELD in *Halleck v. Mixer*, 16 Cal. 579, in these words: "The plaintiff out of possession cannot sue for property severed from the freehold when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title."

The reason for the rule is, that the personal action of replevin shall not be used as a means of determining the title to real property, as between adverse claims thereto. But a mere intruder or trespasser who enters on the land of another and cuts hay or other growing thing therefrom, is in no condition to question the title of the owner, so as to defeat an action brought by him to recover the possession of the chattel. (*Page v. Fowler*, 28 Cal. 607; *Same v. Same*, 37 Cal. 105; *Pennybecker v. McDougal*, 46 Cal. 661; *Harlan v. Harlan*, 15 Pa. St. 513; 53 Am. Dec. 612; *Stockwell v. Phelps*, 34 N. Y. 363; *Nichols v. Dewey*, 4 Allen, 386; *Atherton v. Fowler*, 96 U. S. 515; Wells on Replevin, secs. 79-83.)

In this case the evidence shows that the land was held by the plaintiff for hay and pasture. The tract in question was not specially enclosed or occupied, but it and much more land in the vicinity and of the same character, to which the plaintiff claimed to derive title from the state as swamp, was enclosed against stock by Lake Warner, exterior fences, some of which belonged to adjoining lands, and by herding or patrolling a small portion of the exterior line.

In the spring of 1885 the defendant went on the land openly with his family with the knowledge of the plaintiff and against his protest, for the purpose of acquiring it under the pre-emption law of the United States, and has resided thereon ever since. He knew that the plaintiff claimed the land under the state as swamp, and his possession was adverse to such claim, and taken and held on the theory that the land was not swamp, and was fit for cultivation. The defendant erected a cabin and stable on the land, and in the summer of 1886 cut and stacked the hay in question on the premises, for the use of his stock. During this time the plaintiff was not in the actual possession of any portion of the land, but he continued to claim it as his property and told the defendant he would appeal to the law to protect his right.

On this state of facts the defendant is not a mere trespasser or intruder. His possession is open and notorious, and has the usual indications of permanence. It is held apparently in good faith, with a claim of right and a denial of the plaintiff's right. True, he does not hold under color of title, which is nothing less than a deed or instrument, that is *prima facie* a good title, although in fact it is worthless. (*Stark v. Starr*, 1 Sawy. 20.)

But a person in possession of public land for the purpose of acquiring title to it under the pre-emption act cannot, consistently with such claim, hold under color of title. The title, as he claims, is in the United States, and he holds possession under the act, for the purpose and with the intention of acquiring such title thereunder, subject to the determination, by the land department, of the question whether the land is swamp or not. And this, I think, in such a case, ought to be considered the equivalent of holding under color of title in ordinary ones. In *Page v. Fowler*, 28 Cal. 605, it was held, in a similar case, that the

possession of the defendant, if adverse, need not be held under color of title.

Of course if it appeared that this land had been designated by the secretary of the interior as swamp, within the grant to the state of 1860, it would not be sufficient to defeat this action, for the defendant to allege that he was in the adverse possession of the same, in good faith, with intent to acquire the title thereto under the pre-emption act. Such a plea would be false on its face. The land having been identified by the secretary as inuring to the state under the swamp-land grant, the title would have passed out of the United States, and the defendant could acquire no right thereto under the pre-emption or any other act of the United States. In such case, however adverse the defendant's possession, to defeat this action he must also allege and prove that he was holding in good faith under color of title.

Having reached the conclusion that the plaintiff cannot maintain this action, it is unnecessary to pass on the question, whether this land is swamp or not. And I do not regret it; for in my judgment no one is qualified to decide the question in a case like this, where apparently there is room, in the present condition of the land, for difference of opinion, without having a view of the premises and the surroundings.

Much of the testimony is given by interested parties, and is very contradictory. The difficulty is still further enhanced by the fact that the inquiry is as to the condition or character of the land on March 12, 1860, rather than the present time.

A shallow lake or marsh, which is caused principally by the general wash and drainage of the surrounding high lands, might now be much reduced in extent and depth through the greater portion of the year, compared with what it was in 1860, and such is the tendency of the evidence in this case. When the country was unoccupied, and the ground untrodden and soft and thickly covered with grass and other vegetation, the passage of the water—melted snow or rain—over the surface of the ground was thereby impeded. The result was that it sank into the soft earth and percolated through the soil slowly to the level of the lake or marsh at an even flow, far into the summer, and thus kept the water therein at a uniform level for much of the year.

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But now, owing to the change in these conditions—the destruction of the surface vegetation and the packing of the ground—the water from the spring melt or freshet runs off into the low land, at once, and produces a great annual overflow which soon subsides. The water being spread over a large space is rapidly reduced by evaporation, and the result is, that for the most of the year the water or moisture stands at comparatively much lower level than formerly.

It is a great misfortune to the country, that the secretary of the interior did not take the field notes of the surveys as fast as they were made, and designate the lands inuring to the state, as swamp, at once. For more than a quarter of a century the land department has left the question to be wrestled with in a sporadic way by conflicting claimants under the swamp-land grant and the pre-emption and homestead acts, at a great sacrifice of money, time, and probably veracity. Let us hope that the end of the contention draws nigh, and that the department will proceed at an early day to designate the lands inuring to Oregon under this grant, and put the matter at rest. It were better the grant had never been made than that its extent and application should be the subject of continual contention between parties claiming under and against it.

There must be a finding for the defendant in accordance with this opinion, that at and before the cutting of the hay he was in the adverse possession of the premises whereon the same was cut, and that he is entitled to a return of the same, or the value thereof, at the rate of four dollars per ton, with legal interest for the detention thereof from the date of the replevy by the marshal.

SAME v. DUKE BENNETT.

SAME v. JOSEPH HILL.

SAME v. JOSEPH MONOW.

SAME v. AMOS BOYD.

SAME v. S. E. SLOANE.

DEADY, J. These cases were heard with the foregoing, and the circumstances of the entry, occupation, and character of the

land are similar. The several tracts of land claimed by the defendants are all embraced within the sale of swamp lands by the state, as shown in the foregoing opinion, under which the plaintiff claims. They each claim one quarter section except one, who claims a half section. The settlement and improvement of each was made in 1885, and in 1886 the hay, to recover which these several actions are brought, was cut and stacked on the land occupied by him.

The land occupied by all the defendants is comprised in two tracts, not far distant, which lie on the margin and within the meandered line of Warner Lake, near the south boundary of the state.

For the reasons given in the foregoing opinion, there must be a finding for defendant in each case.

HERMAN A. HARDENBERG v. THOMAS L. RAY ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 23, 1888.

1. DEVISE OF AFTER-ACQUIRED PROPERTY.—A residuary devise of real property under the Oregon statute of wills (sec. 1) may and will pass after-acquired property, if such appears to have been the intention of the testator.
2. INTENTION OF THE TESTATOR.—H., an unmarried man living in Portland, made his will, and after making two specific devises of real property situate in New York, devised and bequeathed to his sister, Ellen E. Ray, all the rest of his lands wherever situate, and all his "personal property and estate of whatever kind or nature;" after which he purchased other real property, of which he died seised, leaving brothers, including the plaintiff, not mentioned in his will. Held, that the intention of the testator to make his sister Ellen his residuary devisee was manifest, and that she took the after-acquired property under the devise in the will.

Before DEADY, District Judge.

Mr. F. A. E. Starr, and *Mr. Benton Killin*, for the plaintiff.

Mr. James K. Kelly, *Mr. C. E. S. Wood*, and *Mr. George H. Williams*, for the defendants; for whom *Mr. Robert L. McKee* also filed a brief.

DEADY, J. This action is brought to recover possession of the south half of lots numbered 2 and 7, in block 39, of Portland,

according to the plat thereof, alleged to be worth over five thousand dollars.

The plaintiff is a citizen of the state of New York. The action was brought against Charles Sliter, J. C. Miller, and W. H. West, the persons in the possession of the premises, who answered that they were in possession only as tenants of Thomas L. Ray, Rachel L. Ray, H. E. Ray, Mary E. Arbuckle, John De Witt Ray, and Sarah A. Ray, giving their residence, and asking that they might be substituted as defendants in the action.

A defendant may answer that he is in possession only as the tenant of another, naming him and his place of residence, but it is both impertinent and improper to go farther and ask that such person be made defendant. When he declines the controversy, as he may do, he should not further meddle with it. (See *McDonald v. Cooper*, ante; 32 Fed. Rep. 745.)

These parties were afterwards made defendants in place of the tenants on their own motion, and answered, admitting they were all citizens of Oregon, excepting John De Witt Ray, who is a citizen of Illinois, and Sarah A. Ray, who is a citizen of New York.

It is alleged in the complaint that the plaintiff is the owner in fee-simple of an undivided one third of the premises, and entitled to the immediate possession thereof. The answer contains a denial of the plaintiff's ownership of any interest in the premises, or his right to the possession thereof; and also a defense to the effect that the defendants are the owners in fee-simple of the premises. The reply contains a denial of the defendants' ownership of the premises, except the undivided one sixth thereof.

By a stipulation duly filed the parties consented that the cause might be tried by the court without the intervention of a jury.

It was also stipulated that a certain agreed statement might be used on the trial as evidence, from which the following facts appear:—

On May 15, 1872, Peter De Witt Hardenberg made and published his last will and testament, whereby he devised and bequeathed, (1) to Thomas H. and Jacob H. Tremper, of Ulster County, New York, and Thomas L. and John De Witt Ray, of Belvidere, Illinois, all his interest in a certain farm in said

county; (2) to Catherine L. Tremper, of said county, all his lands lying therein; and (3) to Ellen E. Ray, of said Belvidere, "all my right, title, and interest in and to all my lands, lots, and real estate lying and being in the state of Oregon, or elsewhere, except as aforesaid; also, all my personal property and estate of whatever kind or nature."

After the death of the testator—the time of which is not stated—this will was duly admitted to probate, and, as such, is now in full force and effect.

On January 9, 1882, the testator purchased and became the owner in fee-simple of the premises in controversy, and so continued until his death.

At his death the testator left the following heirs: T. Rutzen, Herman R. and Philip L. Hardenberg, his brothers; Catherine L. Tremper, his sister; Mary E. Arbuckle, Samuel A., Hylah E., Rachel L., Thomas L., and John De Witt Ray, the children and only heirs of Ellen E. Ray, aforesaid, who died in December, 1873; and Rachel F. Lefevre, the daughter and only heir of a sister of the testator's, before that time deceased.

When this action was commenced the defendants, Mary E. Arbuckle, Thomas L., Rachel L., and Hylah E. Ray, were citizens of the state of Oregon, the defendant, John De Witt Ray, was a citizen of Illinois, and Sarah A. Ray was a citizen of New York.

On the trial, the plaintiff proved that prior to the commencement of the action he demanded of the defendants to be let into possession with them, which they refused; and that on September 24, 1885, Rachel F. Lefevre, for the consideration of one dollar, conveyed and assigned all her interest in the estate of the deceased to Herman R. Hardenberg, the plaintiff, while the defendants proved that said Rachel F., on November 3, 1886, in consideration of two hundred dollars, released and quit-claimed to them all her interest in the premises in controversy. It was also proved that the testator owned other valuable real property in Portland, at the time of making his will, of which he died seised.

It is objected, *in limine*, that the court is without jurisdiction of the case, because two of the present defendants—John

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De Witt Ray and Sarah A. Ray—are not citizens of Oregon, but of Illinois and New York respectively. If this objection is well taken, it only goes to the jurisdiction of the court over these two defendants. The parties being tenants in common of the property, the plaintiff has a separate cause of action against each of them, in respect to the ouster or deprivation of possession, on which he may sue them separately or jointly. (Code Civ. Proc. sec. 91.)

Prior to the judiciary act of March 3, 1887 (24 Stats. 552), a person could only be sued in a circuit court in the district whereof he was an inhabitant, or in which he might be found at the commencement of the action. But it has always been held that this exemption is the personal privilege of the defendant, which he may waive and does waive by a voluntary appearance. (*Dunlap v. Stetson*, 4 Mason, 360; *Toland v. Sprague*, 12 Peters, 331; *Kendall v. United States*, 12 Peters, 623; *Herndon v. Ridgway*, 17 How. 425.)

By the act of 1887 a person may be sued in a circuit court, in the district in which he or the plaintiff resides; but he can no longer be sued in any district in which he may be found. But I see no reason why the old rule of construction should not apply, so that, if a party defendant voluntarily appears in an action brought in a district other than that in which he or the plaintiff resides, he may do so and the court thereby acquire jurisdiction of his person. In such case, the plaintiff and John De Witt Ray, being citizens of different states, and the latter having voluntarily appeared in the action, the court would acquire jurisdiction.

But as to Sarah A. Ray, this suggestion is not applicable. She is a citizen of the same state with the plaintiff; and the court has not and cannot acquire jurisdiction over a controversy between such parties. Where the jurisdiction of the court depends on the diverse citizenship of the parties, and such diversity does not exist, consent cannot confer it.

But I do not think this objection well taken as to either of these parties on another ground.

When the summons in this action was served on the original defendants—Sliter, Miller, and West—the persons in posses—

sion, the court acquired jurisdiction of the controversy and the parties to the action, and no subsequent change in the citizenship or *personnel* thereof can affect such jurisdiction. As was said by Mr. Chief Justice Marshall in *Mollan v. Torrance*, 9 Wheat. 539: "The jurisdiction of the court depends on the state of things at the time of the action brought, and after vesting it cannot be ousted by subsequent events." To the same effect is the ruling of the court in *Dunn v. Clarke*, 8 Peters, 1; *Clarke v. Matthewson*, 12 Peters, 164; *Whyte v. Gibbes*, 20 How. 542. For instance, it is held in *Clarke v. Matthewson*, *supra*, that where the plaintiff, a citizen of Connecticut, died pending a suit in the circuit court for the district of Rhode Island against citizens of the latter state, his administrator, also a citizen of Rhode Island, could continue the suit. In delivering the opinion of the court, Mr. Justice Story said: "The parties to the original suit were citizens of different states; and the jurisdiction of the court completely attached to the controversy. Having so attached, it could not be divested by any subsequent events, and the court had a rightful authority to proceed to a final determination of it. If, after the commencement of the suit, the original plaintiff had removed into, and become a citizen of Rhode Island, the jurisdiction over the cause would not have been divested by such change of domicile."

The change of parties defendant in this case is allowed for the benefit of the landlord, the present defendants, and was made at their instance. The jurisdiction of the court had completely attached before they were substituted for the original defendants, and so far as the question of jurisdiction is concerned, the parties to the action are not changed, and they stand in it as the mere representatives or substitutes of such defendants, the same as an administrator is of his intestate.

The objection to the jurisdiction is not sustained.

The next question in the case is, whether the property in controversy, having been acquired by the testator after the making of his will, passes thereby to the residuary devisee or descends to his heirs.

The contention of the plaintiff is, that under the Oregon statute the will speaks from the making thereof and not from the

death of the testator, and therefore, as to after-acquired property, he is deemed to die intestate and the same goes to his heirs; and even admitting that the testator had the power under the statute to devise all the lands of which he might die seised by a will anterior in date to the acquisition thereof, such after-acquired estate would not pass thereby, unless the intention that it should was plainly expressed in the will.

On the contrary, the defendants contend that the devise to their ancestor, Ellen E. Ray, should be held to speak from the death of the testator and thus include all the property not otherwise disposed of, whereof he died seised; and that it is manifest from the language of the devise and the circumstances of the testator that such was his intention.

The Oregon statute of wills was passed at the first session of the territorial legislature, on September 26, 1849 (Hamilton Laws, 274, 1850-51), and was taken from the Revised Statutes of Missouri.

The "commissioners to prepare a code of laws for the territory," appointed under the act of January 12, 1853 (Sess. Laws, 57), reported the same for adoption with some unimportant alterations, and it was thus re-enacted on December 15, 1853 (Code of 1853-54, p. 354), and took effect May 1, 1854. By the repealing act, supplemental to the Code of Civil Procedure, passed October 17, 1862 (Sess. Laws, 124), certain sections of the act relating to procedure, namely, sections 6, 15 to 23, and 27 to 34 inclusive, and 49 and 52, were repealed, because the matter was included in said code, then just passed.

Section 1 of the act gives the power to make a will. It reads as follows: "That every person of twenty-one years of age and upwards, of sound mind, may, by last will, devise all his estate, real and personal, saving to the widow her dower."

The colonists on the Atlantic Coast brought with them from England the common law, and with some modifications, mostly political, adopted it as the basis of their social fabric and jurisprudence. Two hundred years later their descendants brought this "code of matured ethics and enlarged civil wisdom" (1 Kent, 342) across the plains to Oregon, where, on June 27, 1844, it was formally declared by the legislature of the provis-

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ional government to be "the law of the land," with the qualifications following: "All the statute laws of Iowa territory passed at the first session of the legislative assembly of said territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government, unless otherwise modified; and the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of the land." (Laws of 1843-49, p. 100.)

At common law no greater estate in lands than for a term of years, which was regarded as personal property, could pass or be conveyed by will. In time, however, the law was evaded by making a feoffment to the use of the feoffor's last will, and he being considered seised of the use and not the land, could in effect devise it, by devising the use. But the statute of uses (27 Henry VIII.) by uniting the land to the use made this device of no further avail. And this led within five years to the enactment of the famous statute of wills (32 Henry VIII.), by which any person "having" land held *in socage* might dispose of the same by will, or if held by knight's service might in like manner dispose of two parts of the same. (1 Jarman on Wills, 58; 1 Redfield on Wills, 2; 4 Kent, 501; 2 Black, 374.)

A devise of lands under this statute was held by the English courts to be a species of conveyance; and as a person could not at common law convey what he did not then have, it followed as a matter of course that lands acquired by the testator after the making of his will could not pass thereby. The fact that the English statute only conferred this testamentary power on persons "having" lands, also influenced the result. By implication the statute was construed as if it read: "No person can devise land unless he has it at the time of making his will." This conclusion was doubtless promoted and strengthened by the prevailing sentiment of the country, that regarded the testamentary disposition of real property as a species of injustice to the heir, whose right to the possession on the death of the ancestor was considered equal to that of the ancestor himself.

This continued to be the law of England until the passage of the act of Victoria I., ch. 26 (1837), by which (sec. 3) any person was authorized to dispose of by will all real property to which he was entitled "at the time of his death"; and (sec. 24) it was provided, that every will shall be construed with reference to such property, "to speak and take effect" as at the death of the testator, "unless a contrary intention shall appear by the will."

In my judgment the statute of Henry VIII. is no part of the common law, and as such did not become a part of the law of the English colonies. It is conceded that the common law of England, as it stood prior to the accession of James I., together with the statutes passed in aid thereof, was brought to this country by the colonists and became the basis of the law of the land. (1 Kent, 342, 472; Story's *Comm. Con.* secs. 147, 157, 158.)

The statute of wills, so far from being in aid of the common law, was in derogation of it, and *pro tanto* superseded it.

But the statute was a step in advance, in the direction of the political renaissance that was then awakening the civilized world, and it was specially or substantially adopted in most of the colonies, but with it the construction put thereon by the English courts.

Soon after the Revolution, in obedience to the growing sentiment in favor of limiting and reducing restraints on the disposition of real property, the legislatures of the several states began to enlarge the power of testamentary disposition of the same. Virginia led off in 1785. By an act passed that year it was expressly provided that any one might devise any interest in lands which he might have at the time of his death. (*Smith v. Edrington*, 8 Cranch, 28.)

And now, either by statute or judicial construction, the rule is established in most of the American states in accordance with that prescribed in the English statute of Victoria I., that a will is deemed to speak from the death of the testator, and shall operate on all his estate at that time, so far as its terms are applicable, unless his intention appears to have been otherwise. (1 *Redfield on Wills*, 379, n. 2.) But in a number of the states, including Massachusetts and New York, while the power is

given in express terms to devise after-acquired property, the same does not pass thereby, unless it appears that it was the intention of the testator that it should. (3 Jarman on Wills, 5 Am. ed. 742, n. 5.) In the brief of counsel for the plaintiff it is stated that the statutes of the states of Oregon, Louisiana, and Arkansas are the only ones that contain no provision on the subject of after-acquired property, nor the time when a will is deemed to speak. But in the note to 3 Jarman, just cited, Oregon is classed among the states in which after-acquired real property passes by devise, without any qualification as to the intent of the testator.

And now, as to the power of testamentary disposition conferred by the Oregon statute. Reading it without the prejudice or prepossession arising from the act of Henry VIII., and the ruling of the English courts thereon, there is nothing to indicate that it was the intention of the legislature to limit the disposing power of the testator in any respect. He is authorized to devise all his estate, real and personal, saving to the widow her dower. Apparently real and personal property are put on the same footing; and there never was any question, but that a bequest of personal property carried with it subsequent acquisitions, unless a contrary intention appeared. It is common learning and the popular impression that a will takes effect only on the death of the testator, and when a person is authorized to dispose of all his property in that way, the reasonable and fair implication is that he may and can so frame his will as to dispose of all the property he may have when it takes effect, that he may die seised or possessed of.

Unlike the statute of Henry VIII. the Oregon act contains no word indicating that the disposing power thereby conferred was limited to land which the testator might *have* or be *seised* of at the time of making his will. Neither is this statute to be construed, as that was, in subordination to a rule or principle, then vital in the common law, that no one could or should convey land of which he was not seised or possessed at the time.

Since May 1, 1854, a statute of this state has declared that a conveyance of lands in the actual, adverse possession of another shall not for that reason be held void. (2 Or. Laws, sec. 3009.)

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And in *Taggart v. Risley*, 4 Or. 235, it was held that a conveyance of specific land by a deed of grant, bargain, and sale, from which it appeared that it was the intention of the grantors to dispose of the land in question, and not merely their interest therein, passed an after-acquired estate in the premises, or estopped the grantors from setting it up, as against the grantees. (See, also, *Lamb v. Davenport*, 1 Sawy. 609.)

This is not a question of common law. The power to dispose of real property by will exists with us by the statute, and any devise thereof must be measured and tested by the statute under which it is made.

Applying the language of this statute to the subject-matter thereof, according to the spirit and tendency of the age in which it was passed and we live, and the analogies of the existing law on the subject of assurances of real property, as well as the manifest convenience and utility of the matter, in my judgment it conferred on the testator power to devise all the property of which he died seised.

As has been stated, this statute was borrowed from Missouri—taken from the Revised Statutes of that state of 1835 or 1845, some copies of which were brought to the territory, by the early emigrants from that state. Since the adoption of the statute here, the courts of Missouri have held, in *Liggat v. Hart*, 23 Mo. 127 (1856), and *Applegate v. Smith*, 31 Mo. 166 (1860), that it conferred the power to devise after-acquired property. The opinion of Mr. Justice Leonard, in *Liggat v. Hart*, is both able and interesting, and I think its reasoning sound and the conclusion correct.

The statute confers the unqualified power of disposing of real and personal property by will; and a will made under it may and will pass an after-acquired interest in the land, if such appears to have been the intention of the testator.

Counsel for the plaintiff cites an expression of mine in *Coulson v. Holmes*, 5 Sawy. 281, to the effect, that real property acquired after the making of a will does not pass thereby.

The question decided in the case was, that a conveyance of property by deed supersedes the prior disposition of it by will, and therefore the property went to the grantee and not the

devisee. The remark was made by way of argument or illustration, from the standpoint of the common-law construction of the statute of Henry VIII., and without any special reference to the statute of Oregon.

This is a mere *obiter dictum*, and has no application to a will made under the Oregon statute.

Admitting that the testator had the power to dispose of the property in controversy by this will, the next question is, has he done so?

This is a question of intention, to be decided on the language of the will, the circumstances of the testator, and the reasonable inference, that when a will purports to dispose of all the testator's property it was his intention to dispose of all that he might die seised or possessed of, unless something appears to the contrary. (*Cushing v. Aylwin*, 53 Mass. 175.) In this case the testator, after disposing of specific interests in lands elsewhere than in Oregon, devises and bequeaths to his sister, the ancestor of the defendants, all his "lots, lands, and real estate" in the state of Oregon or elsewhere; also all his "personal property and estate of whatever kind or nature." This language clearly indicates that the testator did not intend to die intestate as to any of his property, but that he intended to make his sister, Ellen E. Ray, his residuary devisee and legatee, for reasons satisfactory to himself.

Mr. Redfield says (1 Redfield on Wills, 385): "General devises and bequests seem to have been universally construed to include all which it was in the power of the testator to dispose of, which, as the law now stands, in most of the American states, will embrace all the testator's estate, whether real or personal, at the time of his decease."

Indeed, the power being admitted, the intention to devise the property seems too plain for argument.

The testator, "Peter Hardenberg," was well known in Portland, where he lived from 1850 to his death. His property was the fruit of his own industry and economy. He had no family; and it is very improbable that he intended to die intestate as to this valuable property, worth probably thirty thousand dollars, and thus allow those whom he had deliberately excluded by his

will from all benefit in his estate as it then stood, to share the same with his sister, Ellen E. Ray, or her children.

We are not here to consider the propriety of this devise, which was a matter solely for the testator, but the probability of it. If he did not intend property of such value to pass under the residuary devise to his sister, the language of which he knew fully embraced it, he would most naturally have made another will or added a codicil to this. But he evidently rested satisfied on the impression that, having devised all his lands wherever situate and all his "estate of whatever kind or nature" to his sister, she would get all he *died seised and possessed of*; and had these latter words been inserted in the will, as they should have been, the intent would have been demonstrated beyond a peradventure.

The purchase of this property probably diminished by that much the personal estate which otherwise would have come to the defendants under the will. In making the exchange or investment the testator would naturally act on the impression that he was simply converting the money he intended for his sister into real property for her benefit at his death.

This conclusion makes it unnecessary to consider the effect of the deeds from Rachel F. Lefevre to the parties plaintiff and defendant. She had no interest in the property to convey.

There must be a finding of fact for the defendants as indicated in this opinion.

J. A. DA CORUZ ET AL. v. THE BARQUE CAPE HORN PIGEON.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JANUARY 27, 1888.

THE BASIS ON WHICH the share of the seamen of the catch on the whaling fleet during this last season examined and found to be reasonable and fair.

Before HOFFMAN, District Judge.

Daniel T. Sullivan, Esq., and F. Van Norman, Esq., for libellant.

Milton Andros, Esq., and Chas. Page, Esq., for respondents.

HOFFMAN, J. This is one of the several libels filed by the crews of the whaling fleet, which arrived at this port at the close of last year's whaling season, to procure a revision by the court of the settlements made or offered to the men.

It was stipulated by the advocates representing all the vessels libeled and all the libellants that the testimony should be confined to the inquiry, whether the valuation of the oil and bone, which formed the basis on which the men's accounts were made up and adjusted, was fair and reasonable, and, if not, the court should determine on what valuation the accounts should be restated.

The testimony was quite voluminous.

I have very carefully perused it. The conclusions I have reached are in accordance with the impressions I received from hearing it orally delivered.

1. With regard to the oil, I think it is conclusively shown that the price at which it was valued was fair, if not liberal.

2. As to the bone.

It seems that there is no market for bone in this city. The valuation on which the accounts must be adjusted is the market price in New York, less the freight, shrinkage, insurance, and other charges and expenses incident to placing the bone on that market.

The losses on a ton of bone shipped at this port, as taken from the ship and put on the market at New York, appear to be as follows:—

Shrinkage between San Francisco and New Bedford	
10 per cent.....	200 lbs.
Shrinkage by cleaning at New Bedford 5 per cent.....	100 lbs.
Separating cullings under 4½ feet, 10 per cent.....	200 lbs.
500 lbs.	

There will thus arrive at New York of good culled bone..... 1,500 lbs.
And also of cullings..... 200 lbs.

The charges and expenses incurred, per ton, in placing this quantity of selected bone and cullings on the New York market, and effecting a sale of it, are shown to be as follows:—

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Cartage from ship to railroad.....	\$	50
Freight to New Bedford at $2\frac{1}{2}$ cents per lb.....		50 00
Insurance at $1\frac{1}{4}$ per cent on a valuation of \$1.25 per lb., or \$2500 per ton.....		31 25
Cartage to warehouse at New Bedford		50
Cleaning and culling 1800 lbs. of bone (the quantity arriving after deducting shrinkage) at $2\frac{1}{2}$ cents per lb..		45 00
Cartage at New Bedford for New York.....		50
Freight to New York on 1700 lbs. at $\frac{1}{2}$ cent per lb...		8 50
Insurance to New York at 1-10 of 1 per cent on valuation of \$1.25 per lb.....		2 50
Cartage in New York.....		50
Brokerage in New York.....(say)		50 00
Interest 60 days at 6 per cent per annum on valuation of \$1.25 per lb.....		25 00

These charges aggregate.....	\$	214 25
Adding \$1.25 per lb., the valuation at San Francisco...		\$2,500 00

We have thus total cost of bone, if sold in New York within 60 days after arrival at San Francisco, without including warehouse charges at New Bedford or New York..... \$2,714 25

We have seen that from one ton of bone shipped from San Francisco there will be put on the market at New York, culled and selected bone..... 1,500 lbs.
Cullings 200 lbs.

The bone on arriving at New York is there charged with cost and expenses amounting to..... \$2,714 25

The 200 lbs. of cullings, it is testified, are of little value, perhaps 25 cents per lb., equal to..... 50 00

To enable the owners to settle with the men at \$1.25 per lb., without loss, the 1,500 lbs. of selected bone must be sold at New York, within 60 days, at \$1.77 per lb.

The best offer received by the owners, for any considerable quantity of bone, was \$1.50 per lb. for 100,000 lbs. This was declined. But they offered to sell at \$2 per lb. This offer was also declined. The bone was to be culled and selected bone, delivered free of charges, in New York.

Points decided.

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Several of the ship-owners and agents have testified in court. They are men of great experience in the business, and some of them of unusual intelligence. They affirm very positively and with apparent candor that the basis of settlement adopted by them was in their opinion just and fair to the men. And their opinions derive much support from the fact that the crews of a large part of the whalers have reshipped for the next season on an agreed basis of settlement of \$1.25 per lb. for bone, if the catch amounts to 200 whales or over, and \$1.50 if the catch is less than 200 whales. Twenty cents is to be allowed for oil, without reference to catch.

The number of whales taken during the last season was 345. The men have been settled with on the same basis as that mutually agreed upon for next year, if the catch is over 200 whales.

I find no reason for disturbing the settlement made, on the ground that the men have not been fairly dealt by.

THE DIRECTOR—ALEXANDER BALFOUR ET AL., LIBELLANTS.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 18, 1886.

1. SEAWORTHINESS, WARRANTY OF.—There is an implied warranty of seaworthiness or fitness for the contemplated voyage in every charter party or contract of affreightment on the part of the ship-owner, and this is a condition precedent to performance by the shipper.
2. CASE IN JUDGMENT.—The libellants chartered the Director to carry a cargo of wheat from Portland to Europe, and when she was loaded she commenced, from inherent weakness, to leak, so that her cargo had to be discharged. Held, that the vessel not being seaworthy at the date of the charter and the delivery of the cargo, there was a failure on the part of the ship-owner to perform the condition precedent of the contract, and the shipper was absolved therefrom, and was entitled to recover possession of his wheat and such damages as he may have sustained by reason of such failure.
3. ORDER OF PAYMENT OF CLAIMS.—Assuming that the proceeds of the sale of the vessel are not sufficient to satisfy the demand of the libellants and those of the intervenors, the stevedore who unloaded the cargo having a lien on both cargo and vessel for his services is entitled to be first paid; the claim for towage up the river to Portland and the claim of the libellants for damages for breach of the contract are to be paid *pro rata*—the costs incurred by the libellants in arresting and keeping the vessel to be first paid in full; the carpenter who recaulked and coppered the vessel after the cargo was removed from her, his labor and material being of no benefit to the prior lienors, must be paid last.

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4. ADMIRALTY—REFLEVIN.—In a suit in admiralty, for the possession of personal property, where the same is taken on process issued on the application of the libellants, the same should be delivered to them, and therefore if they procure the arrest of the property and leave it in the custody of the marshall, they cannot recover the cost and expense of such custody either as damages or costs.

Before DEADY, District Judge.

Mr. C. E. S. Wood and *Mr. John W. Whalley*, for the libellants.

Mr. Frederick R. Strong, for the claimants.

Mr. Robert L. McKee, for the intervenors.

DEADY, J. This suit was brought by the libellants, Alexander Balfour, Steven Williamson, Robert Balfour, Alexander Guthrie, and Robert B. Foreman, doing business in this port as Balfour, Guthrie & Co., against the British bark *Director*, her master, William D. Bogart, and 16,868 bags of wheat.

The libel prayed for process against said bark, wheat, and master, to the end that the first might be sold to pay the damages of the libellants; that the second "might be delivered to the libellants" free of all charges and liens; that the master may be restrained from interfering with the wheat during the pendency of the suit; and that he and all others claiming any interest in said vessel or wheat may be cited to appear and answer the libel.

On reading and filing the libel an order was made thereon allowing process to issue, as prayed for in the libel, on the filing of a stipulation by the libellants, in the sum of fifty thousand dollars, as security to the adverse parties for costs and damages thereby incurred, on which the vessel and wheat were subsequently arrested, and all parties in interest cited to appear. Thereupon the master filed a claim of ownership of said vessel on behalf of William W. Turnbull and others; and on the same day said parties and the master appeared in the suit, by counsel, and claimed the possession of the wheat.

The libel alleges that on October 3, 1885, the master of the *Director* chartered her to the libellants to carry a cargo of wheat from this port to Europe, at 42 shillings and 6 pence a ton, stating therein that the vessel was "tight, staunch, strong, and

in every way fitted for such voyage;" that the vessel was laden by the libellants, and as soon as the cargo was on board she commenced to leak so badly she could not proceed on her voyage, and the cargo was discharged.

On exceptions to the libel for misjoinder of causes of action, it was held: (1) "In a suit by a shipper for the non-performance of a contract of affreightment, the facts which establish the liability of the master also give the libellant a lien on the vessel for the amount of his claim, and therefore it is proper and expedient that the proceeding against the owner or master and the vessel should be joined in one libel;" and (2) "When the possession of personal property has been changed by means involving the breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person entitled, under the circumstances, to the possession thereof, may maintain a suit in admiralty to obtain the same." (11 Sawy. 493.)

An amended libel was subsequently filed, in which a sale of the wheat on October 5, 1885, is alleged to have been made to Arthur Bald, of Liverpool, at 36 shillings and 9 pence per 500 pounds, including freight and insurance, to be shipped from this port during the month of October or November of that year, by the Director, she being "a first-class wooden vessel," and fit to carry said cargo, and the loss of the same by reason of the inability of the Director to carry the wheat as per the terms of the sale and the stipulation of the charter party to the damage of the libellants, \$3,036.

On May 31, 1887, the master and claimants answered the libel, admitting the making of the charter party and the loading and unloading of the cargo as stated in the libel, and allege that the master, after discharging the cargo, had the Director hove down and repaired, so that she was ready to receive the wheat again before the expiration of November, and fit to carry the same to its destination, as per the charter party.

In the course of the trial the claimants offered in evidence copies of the Bureau Veritas, or the French Lloyds, for the years 1884 and 1885, to show the character and construction of the Director, in connection with evidence tending to show that the

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libellants' agent at this port, Mr. Walter J. Burns, was familiar with these registers at and before the chartering of the Director, and was therefore chargeable with a knowledge of the facts therein stated concerning the Director. They were admitted without objection for whatever they might prove.

These registers, so far as the libellants are concerned, are mere hearsay, derived from local surveys and inspections made at the instance of the owners and usually in their interest. Judging from what I have seen of such surveys in this case, they are of little or no value as evidence of the true condition of a vessel. Underwriters, from their vocation and business, may be presumed to have a knowledge of their contents. (Whart. Ev. secs. 735, 1243.) But as to others not so related to the subject such presumption does not obtain. (1 Whart. Ev. sec. 639.)

And so far as these libellants are concerned, they are not evidence of any fact about which there is any doubt or controversy in the case.

Assuming, however, that the agent was familiar with these volumes of Veritas, the information imparted to him by them was to the effect that the Director was a first-class wooden vessel, built in 1873, in New Brunswick, principally of spruce, birch, pitch-pine, and hackmatack, with a character rated at 3 | 3, A 1. 1., and about five years of life before her, the last survey having been made at Liverpool in 1883. And this, of course, does not tend to show, as maintained by counsel for the claimants, that the agent of the libellants must or could have known that the Director was not a first-class wooden vessel, but the contrary.

Certain certificates of survey of the Director, made in this port, were also offered in evidence by the claimants to prove the seaworthiness of the vessel, as well as an authenticated copy of a survey purporting to have been made in Hongkong, just prior to her departure from that port for this. Libellants objected, and they were admitted subject to the objection. The objection is well taken. The certificate of the survey of a vessel is *ex parte*—mere hearsay—and is not evidence of the facts contained in it in favor of the person procuring it, whatever it may be

when offered against him. (*Hall v. Franklin Ins. Co.* 9 Pick. 476; *Watson v. The Ins. Co.* 2 Wash. C. C. 152; *Cort v. The Delaware Ins. Co.* 2 Wash. C. C. 375; *United States v. Mitchell*, 2 Wash. C. C. 478; *Saltus v. The Commercial Ins. Co.* 10 Johns. 489; *Abbott v. Sebor*, 3 Johns. Cas. 46; 2 Am. Dec. 139; 1 Whart. Ev. sec. 120.)

Such certificate is evidence of the fact that a survey was made, and when a question arises as to the propriety or necessity of a sale by the master of a stranded or injured vessel in pursuance of such a survey, it may be evidence of the facts contained therein, tending to justify the action of the master. But even then, it is not conclusive and may be contradicted. (*Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 263.)

In this case the proper proof of the facts ascertained on the surveys of the Director is the testimony of the surveyors. In the case of *The Fortitude*, 3 Sum. 263, the surveyors appear to have been examined as witnesses. But the certificate of the survey, dated November 25, 1885, and signed by Nathaniel Ingersoll and John E. Lombard, is competent evidence to qualify the testimony of said Lombard concerning the condition of the vessel at that time, as a statement made by him out of court.

The evidence on the point of unseaworthiness includes, among others, the master, the first and second mate, the carpenter, and one of the crew. The first mate left the vessel on October 7th, and is a witness for the libellants; the others remain with the ship, and testify for the claimants. A number of ship masters, mostly British, testify as to what leakage will render a vessel unseaworthy. Most of them seem to think a vessel is seaworthy so long as her pumps can keep down the leak. "Seaworthy" is doubtless a relative term, depending on the voyage and cargo. Where the cargo is wheat, and the voyage from this port to Europe around Cape Horn, a vessel to be seaworthy must be tight and strong, and not leak through any inherent weakness.

As usual in this class of cases, the evidence is very conflicting. On a careful consideration of it and the degree of credit to be given to the witnesses, I find the facts to be as follows:—

The Director is a wooden vessel of 679 tons register, built principally of spruce, pine, and hackmatack, at Moss Glenn, New

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Brunswick, in 1873, and classed in Veritas 3 | 3 A 1. 1. for six years, from July, 1883, and was docked and remetaled in September of the same year. About the middle of March, 1885, she sailed from Newcastle, New South Wales, to Amoy, China, with a cargo of coal. On May 17th she left the latter port in ballast for Hong Kong, from whence, on June 30th, she sailed for Portland with a cargo of China goods, principally rice, and reached here on September 11th of the same year.

On the voyage to Amoy she encountered a gale off the Solomon Islands, during which she leaked so that the pumps were used continuously. On the voyage from Hong Kong to Portland the weather was very good, except for a couple of days while in the Bashee Channel, when there was an ordinary fresh gale, during which the vessel leaked not less than six inches per hour, and for the rest of the voyage not less than three inches per hour. On her arrival at Portland the master reported to his agents that the vessel was leaking, whereupon a survey was ordered, in pursuance of which, the cargo being discharged, she was first put by the head and some small repairs made about her stern-post, and then by the stern and similar work done about her stern-post; and on October 1st the surveyors reported her leak reduced to 9-100 of an inch per hour, and that she was "fit to carry a dry and perishable cargo to any part of the world."

On October 3d the Director was chartered to the libellants to carry a cargo of wheat from this port to Europe at the rate of 42 shillings and 6 pence per ton. The charter stated that the vessel was "tight, staunch, strong, and every way fitted for such a voyage." And among others it contained the following stipulations: That the vessel would furnish the charterers a certificate from their surveyor "that she is satisfactory to him as regards general condition, stowage, dunnage, draft of water, and ventilation;" that should she fail to pass satisfactory survey, or be unreasonably detained in consequence of having to dry dock for repairs, this charter to be void, at charterers' option; that lay days shall commence twenty-four hours after discharge of inward cargo and the master reports that he is ready to receive cargo; and "ten working lay days" be allowed for loading.

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Between October 3d and 8th the vessel was loaded with wheat by libellant, the same weighing 985 long tons. The cargo was consigned to the order of libellants, and the usual bills of lading taken from the master in their own name, whereby the master admitted the receipt on board in good condition of 16,868 bags of wheat to be delivered at a port in Europe in like condition.

On October 8th Nathaniel Ingersoll, surveyor for the libellants, reported that "this cargo of wheat in sacks has been properly dunnaged under my direction," and "this vessel is properly ventilated and is in good condition to carry a dry and perishable cargo to any part of the world."

On the morning of October the 9th, as the vessel was about to leave her dock and proceed to sea, it was discovered that she was leaking and had an unusual quantity of water in her hold, when a survey was had on the request of the master. On the 10th the surveyors, Nathaniel Ingersoll and John E. Lombard, reported that she was making a little over an inch of water an hour and advised that her cargo be partially discharged, and "the upper course of copper be turned down and the ship's top sides be thoroughly caulked to the plank sheer."

In consequence of this leak and survey the cargo was wholly discharged and placed on the dock; and on October 26th a contract was made with Robert McIntosh for the repair of the vessel, at a cost of \$4,485; the same to be braced, shored, and hove down on either side so as to expose the keel, and caulked, coppered, and otherwise repaired as the surveyors might direct, so as to render her seaworthy.

On November 13th and 16th she was hove down, first on her starboard and then on her port side, and stripped of her sheathing, when it was found that her seams were slack, so that you could put your hand in them; the oakum was wet and sodden, coming away with the sheathing and dropping out of the seams. The keel was badly broomed and split, 35 feet by 9 inches of which was taken out at the center and replaced with Oregon fir. One butt was started on the starboard side, and when she was hove down the water came in under her covering boards fore and aft in great quantity. The vessel was recaulked and

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recoppered, the butt fastened and brought back to her loading berth, where her top sides were caulked. On November 21st, on the request of the master, a survey was ordered, and on the 25th the surveyors last aforesaid reported that the vessel was then "tight, staunch, and in good order to carry a dry and perishable cargo to any part of the world."

Ingersoll died before the testimony was taken, and Lombard testified that he signed the report with much hesitation, and that he was then satisfied that the vessel was not seaworthy or fit to carry this cargo of wheat to Europe; and on November 27th the master informed the libellants that he was ready to reload the cargo.

In the mean time the libellants, on October 8th, had sold the cargo of wheat through their Liverpool house to Arthur Bald of that place. The contract of sale provided that the wheat was the average of the Walla Walla crop of 1885, and was "to be shipped per Director, 679 T. R., a first-class wooden vessel, classed not lower than A 1, English, or 3 | 3 1. 1. French Veritas. . . . As per bills of lading to be dated during October and (or) November, 1885, . . . at the price of 36 shillings and 9 pence per 500 pounds."

On the delivery of the bills of lading, October 8, 1885, the libellants drew on the purchaser for the price of the cargo, appending to the bill of exchange the bills of lading and the policy of insurance of the cargo—the libellants being the underwriters—and negotiated the same with the Bank of British Columbia, in this city. After learning the condition of the vessel and the unlading of the cargo, Mr. Bald repudiated the sale, because of the breach of the condition precedent thereto—that the Director was seaworthy. This determination, following as it did, on some correspondence between the parties, was made known to the Liverpool house on October 28th, and by them to the Portland branch early in November—the bills of lading being remailed to the latter on November 14th.

On November 7th the Portland agents of the libellants wrote to the master stating that he held him, his vessel, and his owners liable for all losses sustained on the cargo of wheat, on the ground of a breach of the warranty contained in the charter that the Director was seaworthy.

Between October 9th and the date of this notice there was correspondence and conversation between the libellants and the ship's agents, Messrs. Taylor, Young & Co., as to the rights and obligations of the parties to the transaction, the former claiming the return of the wheat free and clear of all liens and charges, while the latter was willing to cancel the charter party, if the libellants would bear the expense incident to the unlading and rescision of the contract.

The parties were unable to agree, and the master insisted on holding the cargo, and thereupon this suit was commenced on November 23d to obtain possession of the wheat and for damages on account of the failure to perform the contract of affreightment, in which the vessel was arrested on November 25th and the wheat on November 28th.

Afterwards the following persons intervened for their interests and exhibited libels in the cause: Robert McIntosh, ship carpenter, on January 16, 1886, against the vessel, for the sum of \$4,537, for materials and labor expended in the repair of the same after the wheat was unladen and prior to the survey of November 25th; Richard Lemon, stevedore, on January 23, 1886, against the vessel and cargo, for the sum of \$492.50, for unloading the latter from the vessel preparatory to the survey of October 10th; and the Vancouver Transportation Company, a corporation formed under the laws of Washington territory, on March 4, 1886, against the vessel, for the sum of \$405, for towage up the river on the inward bound voyage.

On the arrest of the wheat the possession of the same was not claimed by the libellants, and it remained in the custody of the marshal. Neither did the claimants make any application for the delivery to them of the vessel, and it also remained in the custody of the marshal. On May 1, 1886, on the application of the libellants and the consent of the claimants, an order was made for the sale of the wheat, and at the same time, on the application of the claimants and the consent of the libellants, an order was made for the sale of the vessel; and in pursuance thereof, on May 18th, the vessel was sold to the agents of the claimants, Taylor, Young & Co., for the sum of \$3,000, and the wheat to C. Caesar & Co., for \$1.17½ per cental, or the sum of

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\$26,282.76, which sum, less \$2,522.46, the marshal's costs and expenses, was paid into the registry of the court. On December 10, 1887, in pursuance of an order made on the application of the libellants, the clerk paid over to the latter \$24,032.76 of the amount, leaving in the registry of the court, as the representative of the vessel, the sum of \$2,727.54.

In considering the question of the seaworthiness of the vessel, but little, if any, weight has been given to the testimony of the master. His conduct throughout renders him, in my judgment, unworthy of credit. It is not necessary to go into details, and one transaction will suffice to show his want of integrity. Although he admits that the vessel made not less than three inches of water any hour between Hong Kong and this port, the log kept by the mate under his special direction does not refer to any leak. After the arrival in this port, however, he had the mate write up a new log, in which it was falsely represented that during the second, third, and fourth days of July the vessel was in a hurricane, with a cross sea boarding her fore and aft, and making so much water, without stating the amount, that it was impossible on the 2d to keep her free with one pump, when the fact was that the vessel experienced no rough weather on the voyage, except a moderate gale in the Bashee Channel, where she did not make more than seven inches of water an hour. This manufactured log was produced to the British consul as the true log, and was made under the apprehension that the cargo was more or less damaged, as a basis of protest against the vessel's liability therefor. However, the cargo came out dry and no further use was made of it.

My conclusion is that the vessel, at the date of the charter, was altogether unseaworthy, considered with reference to the cargo she was to carry and the voyage she was to make. She was structurally defective and inherently weak, was poorly fastened, and leaked all over. Caulking did her but little good. She was repaired, according to Veritas, in 1883, and yet, when the copper was stripped off of her in 1885, the oakum in her seams was so loose and water-soaked that it came away without any apparent resistance. This shows that when the vessel was in motion with a cargo on board, her timbers were working so

as to open her seams, whereby the water passed through until the oakum became sodden and loose. The leakage was not the result of any local defect or injury that could be stopped by some specific repair, and the flow of which was uniform in all weathers and could be counted on with some degree of certainty, without reference to wind or wave, and provided against accordingly.

- She must have worked more or less all over, like a crate or basket, when subject to a strain. The leak fluctuated, the amount depending on her depth in the water and the state of the weather. Lying in still water, at her dock, in ballast, she might not leak over an inch an hour, but in fair weather, when loaded and under sail, the leak would be not less than three inches in the same time, while in tolerably rough weather it would increase to not less than six inches an hour, and to what volume it might reach, would simply depend on the condition of the wind and waves, and how much strain she would bear without filling or going to pieces.

Nor was the vessel seaworthy after the repairs made in this port. She was inherently weak, and this was a defect that caulking and coppering would not cure. It was like patching old cloth with new. Nothing short of rebuilding would have made her fit to carry this cargo of wheat round Cape Horn to Europe. To be seaworthy, the vessel should also have been properly officered and manned, so that insurance could have been effected on her cargo. The libellants were the underwriters of this cargo, and on November 27th, when the vessel was tendered to them as repaired, they had reason to apprehend that it was unsafe to trust the master with this cargo. He might put in some port on the way, and falsely represent that his vessel had been injured at sea, and have her rebuilt at the expense of average on the cargo.

And the small price which the vessel brought when sold here, clear of all liens and claims, shows that she was not considered fit for the wheat trade. Shipping wheat to Europe is the principal business of this port, and many British subjects are engaged in it. The British port of Victoria is also near at hand. All the facts of her condition and career had become well known

here, and still she only sold for \$3,000—a sum considerably less than the cost of the repairs just put on her—and her owners appear to have been the purchasers even at that price. She finally left this port in July with a cargo of lumber for Shanghai, and it is since understood that she was lost somewhere down that coast. The reasonable inference is that she at last went out with a cargo of lumber because she could not get one of wheat.

The representation in the charter that the Director was then “tight, staunch, strong, and every way fitted for such voyage” is a warranty to that effect, and if the charter was silent on the subject the law would imply as much. Seaworthiness is a condition precedent to every charter or contract of affreightment, and where there is no express warranty to that effect, the law implies one.

The authorities concur in holding that where there is no express agreement to the contrary, the owner warrants the ship to be seaworthy, and at the time fit in all respects to carry the cargo described in the contract, to the port or place therein specified. (*Work v. Leathers*, 97 U. S. 379; *Wilson v. Griswold*, 9 Blatchf. 269; *The Vesta*, 6 Fed. Rep. 532; *Davison v. Von Zingen*, 113 U. S. 41; *The Northern Belle*, 9 Wall. 526; *The Tornado*, 108 U. S. 342.)

In *Work v. Leathers*, *supra*, Mr. Justice Swayne, speaking for the court, says: “Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed. If there be defects, known or not known, he is not excused.”

Therefore it makes no difference, so far as the libellants’ right to repudiate this contract of affreightment, and be restored to the possession of their wheat is concerned, whether the vessel was seaworthy on November 27th or not. The undertaking of the claimants was that she was seaworthy at the date of the charter and the commencement of the loading. This was a condition precedent to their right to the possession of the wheat for the purpose of earning freight in carrying it to its destination.

The clause in the charter, “Should the vessel fail to pass satisfactory survey, or be unreasonably detained in consequence of having to dry dock for repairs, this charter to be void, at char-

terers' option," has been referred to as excusing the delay for repairs at this port. But certainly the detention contemplated in this clause must occur after the voyage has commenced. The survey of course was to take place in this port and before loading, and if unsatisfactory, the libellants might then have declared the contract off, and if after the voyage had commenced she had been detained for the cause mentioned, they might then have declared the contract void, and resumed the possession of their wheat.

Admitting, however, that the detention in this port after the unloading of the cargo was a detention within the purview of this clause, it is not apparent how this helps the case of the claimants, for the libellants, in their letter of November 7th, written after the contract for repairs was made, but before the work was commenced, in effect declared the contract off, and gave the claimants notice of their intention to hold them liable for the breach of warranty of seaworthiness.

The libel alleges, among other things, that the libellants were induced to enter into the charter party by the fraud of the master, and they ask to have it declared void on that account. The defense insist that the whole case of the libellants rests on this allegation, and contend that the proof of fraud is not sufficient, and therefore the libel must be dismissed. But the libellants are entitled to such relief as the facts stated in the pleadings, and established by the proof, will warrant.

In this case it is alleged and proved that the claimants failed to keep the condition precedent of their contract—to furnish a seaworthy vessel in all respects, fitted to carry a cargo of wheat from this port to Europe, with reasonable safety and dispatch. This absolved the libellants from the performance of their part of the contract, and entitled them to the return of the cargo and damages for the failure and delay. And it matters not whether the master or owners knew of the unseaworthiness of the vessel or not. They undertook absolutely to furnish in the Director, neither a soft nor hard wood vessel, but one "tight, staunch, strong, and in every way fitted" for the contemplated voyage; in other words, a first-class wooden vessel. Their ignorance of the fact of her unseaworthiness does not excuse them

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for a violation of such undertaking. Nor does the fact that any rumor or gossip in shipping circles in this port that may have come to the ears of the libellants' agent, to the effect that the Director was a leaky vessel, or any knowledge which he may have derived from Veritas that she was built principally of soft wood, qualify the claimants' warranty or estop the libellants from claiming the benefit thereof.

Therefore I do not consider it necessary to go into the question of the fraudulent conduct of the master in the negotiation of this charter party. But if I did, and the fact that he was aware of the condition of the vessel, and intended and endeavored to conceal the same from the charterers and the public, constitutes such conduct, there would be no difficulty in deciding the question in favor of the libellants.

A question is made by the claimants that the wheat belongs to Bald, of Liverpool, and that the libellants have no property in it and cannot therefore maintain any suit about it. My conclusion, as already expressed, is that the sale to Bald fell through because the Director was not a first-class wooden vessel, that being a condition precedent of the contract of sale. Bald testified that he repudiated the sale, as in my judgment he had a right to do. Then by an arrangement between the parties in Liverpool the bills of lading were returned here to the agent of the libellants for the purpose of enabling him to take such action in regard to the wheat as he might think best. And the agent who appears to have become a partner with the libellants since the date of this transaction swears positively that the wheat belongs to the libellants.

It is true that Guthrie, one of the partners in the Liverpool house, testifies that he had never formally released Bald from the contract of sale, and if he had any claim against him on that account, he expected to enforce it. And it is on this expression of what Guthrie would, rather than what he could, the argument against the right of the libellants to maintain this suit is based.

Admitting, however, that the general property in the wheat is in Bald, the libellants hold the bills of lading with his consent and for his interests, if he has any. In *Houseman v. The North*

Carlina, 15 Peters, 49, Chief Justice Taney, delivering the opinion of the court, said: "We consider it well settled in admiralty proceedings, that the agent of absent owners may libel either in his own name as an agent, or in the name of his principals, as he thinks best." And the holder or indorsee of a bill of lading, though not the beneficial owner of the property, may sue for the non-delivery thereof in his own name. (*The Thames*, 14 Wall. 108; *The Vaughn*, 14 Wall. 266.)

The libellants are entitled to recover the possession of the wheat or its money representative in the registry of the court, with damages for the violation of the contract of affreightment. The damages claimed by the libellants are as follows: For the difference between the price brought by the marshal's sale and that for which it was sold to Bald, \$2,981.05; insurance, \$350; and wharfage, \$1,100.

These claims cannot be allowed to this extent. In my judgment, the libellants on filing their bond, as they did, for the arrest of the wheat, could have had the immediate possession of the same if they desired it. At least they might have specially applied for the delivery of the same or for the sale of the property, as they did later on, and have saved the greater part of the insurance and wharfage. I know that it is said that the claimants played the dog in the manger policy, and would not consent to a sale until they wanted an order for the sale of the ship. But it is none the less certain that if application had been made by the libellants the court would have ordered the marshal to turn over the property or to sell the same, and deposit the proceeds in the registry of the court. The damages must be therefore reckoned on the basis, (1) of the difference in the price of wheat at the date of arrest and that to be paid by Bald; and (2) the amount of insurance and wharfage incurred on account of the wheat from the time it was delivered to the master and replevined by the marshal. There is no proof as to what was the price of wheat at this date, or what was the amount incurred for insurance and wharfage. And unless the parties can agree as to these facts, the case must be referred to a commissioner to take testimony on these points. For whatever may be found due the libellants under these heads, within the limits.

tion suggested, they are entitled to a decree against the vessel or its proceeds.

Assuming that the fund in the registry of the court is not sufficient to pay the claims of the intervenors and libellants in full, what are the priorities, if any, between them. The claims all rank as maritime liens, but the time and circumstances under which they arose may affect their priority. The claim of the stevedore is for a maritime service rendered to both cargo and vessel, and therefore he has a lien on the proceeds of both for the amount thereof. (*The Canada*, 7 Sawy. 173.) As between the vessel and the cargo, the former is primarily liable for the claim. It is not an expense incurred during the voyage, which might be the subject of average between the vessel and the cargo. It arose before the vessel had left her dock, and by reason of her unseaworthiness at the date of the charter. The claim must be first paid out of the proceeds of the vessel, and I think it ought to bear interest.

The claims of the transportation company and the carpenter are not made against the cargo.

The only objection that can be made to the payment of the former *pro rata* with that of the libellants is that the service was rendered on a prior voyage—the inward bound one—and it is therefore stale and ought to be deferred to the liens accruing since. I think it would be a harsh application of the rule which prefers a claim arising during a later voyage to one arising during an earlier one, to treat the towage of a vessel up the river to this port as a service rendered on an earlier and different voyage from the return one down the river. I think the coming up and going down the river, so far as towage is concerned, where there is only the usual delay in getting and taking on cargo, ought to be considered one voyage. This claim will be paid *pro rata* with the damages found for the libellants. Taxable costs and disbursements will be allowed on each of the claims as a part of it; but the costs made by the libellants in arresting and keeping the vessel, having been incurred for the benefit of all the claims, must first be paid in full.

The claim of the carpenter must be deferred to the last. He was employed by the agents of the vessel, and doubtless looked

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through them to the owners for his pay. The repairs were made after the other liens had attached. They were made to enable the vessel to commence her voyage, and not to continue it after it had been commenced. Nor were they made for the benefit of the prior lienors.

The claim made by the claimants for demurrage while the vessel was in the custody of the law, at 4 pence per ton per day, the rate prescribed in the charter in case the vessel was detained by the fault of the libellants, is not supported by either the pleadings or proof. The detention was not caused by the default of the libellants, but that of the claimants. And if this were otherwise, I doubt if the claimants could leave the vessel in the custody of the law, when she might have been delivered to them on bond or sold, and then claim demurrage for such detention. This, it seems, would be taking advantage of their own wrong or negligence.

A decree will be entered in accordance with this opinion.

T. W. HALL ET AL. v. GEORGE WEAVER, ADMINISTRATOR.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 29, 1888.

1. **SURETY OR GUARANTOR.**—A person who executes a bond with another as his surety, conditioned for the payment of moneys advanced to the principal by the obligee therein, is a surety and not a mere guarantor, and is not entitled to notice of the acceptance of the bond by the obligee.
2. **ALTERATION OF WRITING.**—When a person executes a bond as surety and leaves it with his principal for delivery to the obligee, and before doing so the former procures a person to attest the signature of the surety who is not authorized to do so, such attestation is not an alteration of the instrument that impairs or affects its value as an instrument of evidence in the hands of the obligee, because it was made before delivery.
3. **DEATH OF SURETY IN BOND.**—The death of a surety in a bond, conditioned for the repayment of money advanced to the principal, within a definite period or before notice to the obligee of withdrawal therefrom, does not terminate his liability, and his estate in the hands of his administrator is liable for advances made after his decease.

Before DEADY, District Judge.

Mr. L. B. Cox, for the plaintiffs.

Mr. Edward R. Watson, for the defendant.

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DEADY, J. On December 23, 1886, the plaintiffs, T. W. Hall, Charles Hall, and W. P. Hall, citizens of the state of Illinois, and doing business in Chicago, under the firm name of T. W. Hall & Co., commenced this action against the defendant, George Weaver, a citizen of Oregon, as administrator of Hans Weaver, deceased, to recover the sum of \$8,503.09, with interest from said date, as and for money theretofore advanced to W. F. Owens on the security of the bond of said Hans Weaver.

On the trial it was admitted that since the commencement of the action the plaintiffs had received from parties to said bond the sum of \$3,663.10 on said demand, and the jury found a verdict for the plaintiffs for the remainder, \$4,839.99, for which sum, with \$171.20, costs and disbursements, the plaintiffs had judgment.

The defendant now moves for a new trial, and it will be necessary to a proper understanding of the matter to make a brief statement of the case.

It is alleged in the complaint that on January 7, 1886, the plaintiffs and W. F. Owens entered into an agreement whereby Owens was to purchase wool in Oregon, and consign the same to the plaintiffs for sale at Chicago, and on the receipt of a consignment of wool, or an agreement to consign, together with a note equal to ten cents a pound of said wool, the plaintiffs were to advance money to Owens on his drafts, to enable him to purchase wool; that in consideration of said undertaking on the part of the plaintiffs, said Owens, as principal, and Robert Phipps, Noah Cornutt, and Hans Weaver, as sureties, all of the county of Douglas, and state of Oregon, on January 7, 1886, executed and delivered to the plaintiffs their certain writing obligatory, in and by which they acknowledged themselves "held and firmly bound unto T. W. Hall & Co. in the full sum of \$20,000 gold coin of the United States, to be paid to said Hall & Co., their assigns or legal representatives, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents;" conditioned as follows: "that if the above bounden W. F. Owens shall well and truly pay unto the said Hall & Co., upon usual and proper demand, the sum or sums

of money paid by said Hall & Co., or honored, so as to be paid on orders, checks or drafts, overdrafts, notes, and demands, or any of them whatsoever, by or from said W. F. Owens, principal aforesaid, to the said Hall & Co., in course of business properly directed; then and in that event, this bond shall become null and void and of no effect; otherwise, the same shall be, remain, and continue in full force, virtue, and effect."

It is also provided that "this bond shall not be construed so as to require the said Hall & Co. to advance any sum or sums of money except as they may see fit;" and that "the duration and existence of this bond and obligation may be terminated at the wish of the principal or any obligor," after due notice to Hall & Co., "and then only after all obligations and legal liabilities thereby assumed or arising therefrom have been fully and completely, and in every respect, legally discharged."

The writing purported to be signed and sealed by said Owens, Phipps, Cornutt, and Weaver, "in presence of C. M. Stephens and J. C. Simmons." Thereafter, on March 2 and April 9, 1886, and on four different days between said dates, the plaintiffs advanced Owens on his six promissory notes the sum of \$8,000, of which only \$322.11 was repaid by Owens, and the balance due thereon, with interest, amounted at the commencement of this action to \$8,503.09.

On September 25, 1886, Owens died intestate and insolvent; and the claim has since been presented to the administrator of his estate and allowed, but not paid for want of funds.

On May 26, 1886, Hans Weaver died, leaving a will, and on June 22, 1886, the defendant was appointed administrator with the will annexed, to whom the claim of the plaintiffs was duly presented for allowance, and by him rejected. The answer of the defendant consists of denials of any knowledge or information concerning the alleged agreement, bond, notes, and advances sufficient to form a belief.

On the trial the plaintiffs called the subscribing witness, C. M. Stephens, who testified that he signed the bond as a witness at the request of Owens, but that the other persons whose names appear signed to the bond, as the makers thereof, were not present, and he did not see them, or either of them, sign the same.

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The plaintiffs then read in evidence the return of the marshal on a subpoena commanding him to summon J. C. Simmons, the other subscribing witness to the bond, to testify in this case, to the effect that said Simmons could not be found in the state. And thereupon, after the plaintiffs had given evidence tending to prove that the signature of Hans Weaver, appended to the bond, was his genuine signature, the same was admitted in evidence. In the course of the trial the court ruled that, (1) the addition of Stephens' name to the bond as a subscribing witness after its execution by the makers thereof, under the circumstances disclosed in his evidence, did not affect it, as an instrument of evidence in the hands of the plaintiff, and instructed the jury that if Weaver signed the bond, as alleged, he was bound by it, notwithstanding the subsequent attestation by Stephens; and (2) the writing in question is not a simple guaranty, but a direct and absolute undertaking by the makers thereof, to pay Hall & Co. the advances made by them to Owens in the course of the business in which he was engaged, and instructed the jury it was not necessary that the plaintiffs should have given Weaver notice of the acceptance of the bond.

The motion for a new trial is based on some eight grounds, but those that were noticed in the argument may be condensed into two. (1) The bond or instrument sued on is a guaranty, and unless notice of the acceptance thereof by the plaintiffs was given to the obligors or makers, they are not liable thereon; (2) the alteration of the instrument by the addition of the name of a subscribing witness, C. M. Stephens, rendered it void.

In deference to the strenuous contention of counsel for the motion for new trial I have re-examined the question, whether the writing signed by Owens and Weaver on January 7, 1886, made the latter a surety for or only a guarantor of the former. And I find neither reason nor authority for holding Weaver's undertaking to be anything different from or less than that of a surety. The terms "surety" and "guarantor" are often used in the books loosely and indiscriminately. They occupy certain ground in common, but there is a marked distinction both in the form and effect of the undertakings.

This distinction is nowhere more clearly stated than in Brandt

on Suretyship and Guaranty. The author says (sec. 1): "A surety or guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. The words 'surety' and 'guarantor' are often used indiscriminately as synonymous terms; but while a surety and guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal in the same instrument, executed at the same time, and on the same consideration. He is an original promissor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually he will not be protected, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal. . . . The principal and surety being directly and equally bound, may be sued jointly in the same suit, while the guarantor being bound by a separate contract only, and collaterally liable, cannot usually be joined in the same suit with the principal."

In *Kearnes v. Montgomery*, 4 W. Va. 29, it is said: "The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety, which is direct; and in general the guarantor contracts to pay, if by the use of due diligence the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default."

In *Courtis v. Dennis*, 7 Met. 518, it was said: "The terms 'sureties' and 'guarantors' are often confounded, from the fact that a guarantor is, in common acceptation, a surety for another.

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The rules, however, of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant; and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible; and his contracts are often specialties; while a guarantor is only liable where default is made by the party whose undertaking is guaranteed; and his agreement is one of simple contract."

Now the undertaking of Weaver, within all these definitions and distinctions, is that of a surety. He became absolutely bound in the same writing and on the same consideration with his principal, Owens, to pay the plaintiffs whatever sums of money they might advance for him, concerning which he might make default. In other words, his contract and liability are the same as his principal. He bound himself to do exactly what Owens did; and whatever was a breach of the bond, as to Owens, was so as to Weaver. His undertaking was an original one, joint and several with Owens, and in no sense collateral to it.

On the other hand, this contract differs from that of a guarantor, which is separate from and collateral to that of the principal, and founded on a distinct consideration.

Cox v. Weed Sewing Machine Co. 57 Miss. 350, is a case on all fours with this. Cox became bound in the same instrument with Gibson to the sewing machine company, that the latter would pay all indebtedness that he might incur to the company. Gibson made default, and in an action on the bond against Cox he insisted that he was a guarantor and not a surety, and was not liable as such because he had not received notice of the acceptance of the bond. The court held that Cox was liable as a surety and not entitled to notice of acceptance of the bond. In the course of his opinion Mr. Chief Justice George cited with approbation Mr. Brandt's definition of a surety, and his statement of the difference between that and a guarantor.

The contention of counsel for the motion for new trial is largely based on the authority of three cases from the state of Michigan, namely, *F. & M. Bank v. Kercheval*, 2 Mich. 508; *Locke v. McVean*, 33 Mich. 473; and *Jeudevine v. Rose*, 36 Mich. 54. In each of these cases a bond was signed by a person.

as surety with a principal, conditioned for the due performance of some act—as the payment of money—by the latter. In actions brought on these several bonds against the sureties therein, the court held the defendants not liable on grounds which in no way involved the question, whether the writings were mere guaranties or absolute undertakings for the debt or default of the principal. In the course of the opinions the terms “surety” and “guarantor” are used interchangeably and indiscriminately, without any reference to the technical distinction between them.

They are all cases of surety and not guaranty, and were evidently decided on that assumption, no question being made as to the character or effect of the writings in this respect.

For instance, in *F. & M. Bank v. Kercheval*, *supra*, the court holds that the bond given to the bank to secure future advances, not exceeding \$3,000 at any one time, is a continuing guaranty, and cites *Douglas v. Reynolds*, 7 Peters, 113, which was a case of simple guaranty, in support of this conclusion, but refuses to follow that case so far as to hold that notice of the acceptance of the guaranty must have been given to the surety therein, because the facts of the two cases in this respect are not similar, and said: “We think no notice of acceptance other than that which the law implies was necessary in the case before us.”

The latest statement of the rule requiring notice of the acceptance of a guaranty is found in *Davis Sewing Machine Company v. Richards*, 115 U. S. 527. In speaking for the court, Mr. Justice Gray, after referring to *Davis v. Wells*, 104 U. S. 159, wherein the cases on the subject in that court from *Douglas v. Reynolds*, 7 Peters, 113, to *Adams v. Jones*, 12 Peters, 213, are reviewed, and as I think limited and straightened out, sums up the rules there laid down as follows: “A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter’s agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor with-

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out any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

It is apparent from this summary of the rules governing the contract of guaranty that the contract sued on in this case, by which Weaver undertook directly, with and as surety for Owens, for the payment of advances made by the plaintiffs to the latter, is not such a contract.

As to the second point, the rule of the common law concerning the alteration or spoilation of writings was very strict. It was indiscriminately punitive, and did not attempt to adjust the consequences of the act according to the justice and propriety of each particular case. Accordingly, not only a material alteration made by a party to the writing without the consent of the other, but one made by a stranger without the consent of the party in whose control the instrument was, would avoid it as to the party making the alteration or having the control thereof; and even an immaterial alteration by a party without the consent of the other would have the same effect.

Gradually the rule became relaxed or questioned as to alterations made by a stranger without the agency of the party, and even alterations made by a party, when immaterial. (*Adams v. Frye*, 3 Met. 104; 1 Whart. Ev. sec. 622, et seq.)

Finally, a reasonable and comprehensive rule was declared in the New York Code of Civil Procedure, section 1794, which is section 778 of the Code of Civil Procedure of this state. It provides: "The party producing a writing as genuine, which has been altered or appears to have been altered after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise."

As there is no evidence when or under what circumstances

the name of J. C. Simmons was signed to the bond as a witness to its execution, the presumption is that it was duly done, and before the delivery of the instrument. (1 Whart. Ev. sec. 629.) The effect of signing the name of Stephens to the instrument as a witness to its execution is to require the party offering it to call him as a witness thereto, if he be living or within the state; otherwise, his handwriting as well as that of the party must be proved. (Or. Code Civ. Proc. sec. 751.)

Does it then appear how this alleged alteration is material, or is of any advantage to the plaintiffs? The party offering the bond with this signature upon it is bound to produce the subscribing witness and examine him as to the execution thereof by Weaver, or account for his absence by showing that he is dead or without the state; and even then he must prove the handwriting of the absent witness, as well as that of the party himself, whereas, if the name of the witness was not on the bond, proof of the handwriting of the party would be sufficient. And, as was said in the case of a similar alteration (*Adams v. Frye*, *supra*, 105), "the terms and stipulations originally contained in the body of the bond have not been altered in substance, nor even in letter. The attestation by one or more witnesses of the due execution of a bond is not requisite to its validity, either by common law or by statute. It is a perfect instrument, and may be enforced in a court of law without any such attestation. The change produced in the character of the instrument by this alteration is not one which thus affects in any degree the validity or construction of the contract of the parties. At most, it only operates on the course of the proceeding in a trial at law, as to the nature and kind of evidence required to prove the execution of the instrument."

It is true, that notwithstanding these suggestions, the court, in *Adams v. Frye*, held that the procurement by the obligee in a bond of the signature thereto of a person as a witness, after the delivery of the same, if done fraudulently with a view to gain any improper advantage, would avoid the instrument as to such obligee; and that the act of procuring such signature to a bond by a person who was not present at its execution, nor authorized to attest it, is *prima facie* evidence of a fraudulent intent.

But this conclusion was reached under the rule of the common law, which makes the proof of the handwriting of an absent witness sufficient evidence of the execution of the instrument. (*Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715; 1 Whart. Ev. sec. 726.)

This is evident from the reasons given by the court for the ruling. After stating that by this alteration, a material change was made as to the nature and kind of evidence which might be relied on to prove the plaintiffs' case, the court says: "By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution thereof, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness; and yet the attestation might be wholly unauthorized and fraudulent."

But under the statute of this state, proof of the handwriting of the absent witness is not enough. The handwriting of the party must also be proved; and the result is, the alteration would, in case of the absence of the witness, cast on the plaintiffs the burden of proving his signature as well as that of Weaver's.

On the other hand, it may be said that in the case of such an alteration with a fraudulent purpose the party would likely be prepared to prove the signature of the conveniently absent witness, beyond a peradventure, which circumstance might have weight with a jury, and induce them to find, on otherwise light and unsatisfactory evidence, that the signature of the party to the instrument is genuine, because it had been attested by a subscribing witness. And on this view of the case I am inclined, on the whole, to say with the court, in *Adams v. Frye*, *supra*, 107: "It seems to us that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity."

And therefore it may be safer to hold, even under the law of this state, that the procurement by the holder of a writing, or an

obligee in a bond, of the signature of a person as a subscribing witness thereto, who is not authorized to attest the same, is *prima facie* a fraudulent alteration thereof, and unless shown to be otherwise, will avoid the instrument as to him, or prevent his use of it as evidence in an action thereon. So far I have been considering the case as made in the argument of counsel for the defendant, and insisted on by them at the trial.

But the real case is a very different one. No alteration of a writing before execution, which includes delivery, affects its character or value as an instrument of evidence. Alterations before delivery are presumed to be made with mutual consent. The very act of delivering and receiving the writing implies so much. This is the doctrine of the common law. "The period after which alterations, not mutual, are fatal, is that of the final delivery of the document." (1 Whart. Ev. sec. 625.) And the Code of Civil Procedure, section 778, says the same: "The party producing a writing as genuine, which has been altered or appears to have been altered after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration."

The attestation of Stephens was made at the request of Owens, and this authorized him to attest the same, so far as Owens' signature is concerned. But the attestation being unqualified, the reasonable inference is, that it included the signature of the other obligors as well as Owens, and so it was doubtless intended.

Weaver and his co-obligors who signed this bond, and left it with the principal therein, to deliver to the plaintiffs, thereby constituted the latter their agent for that purpose. (*Bellou v. Freeborn*, 63 N. Y. 389.) Before the delivery was made this alteration took place. It consisted of an attestation which, for ought that appeared, was authorized and genuine. So far as the plaintiffs are concerned, it was the act of Weaver and his co-sureties, acting through the agent and co-obligor, Owens, prior to the delivery to them of the writing.

To hold that the value or admissibility of the writing as an item of proof or an instrument of evidence is thereby impaired or affected in the hands of the plaintiffs, would be simply monstrous.

The motion for a new trial is denied.

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ISAAC HECHT ET AL. v. THE SAME.

DEADY, J. A motion for a new trial in this case was argued and submitted with the one in the foregoing case.

The action was commenced by the plaintiffs, Isaac Hecht, A. E. Hecht, and M. W. Hecht, who are citizens of Massachusetts, against the defendant, as administrator of the estate of Hans Weaver, deceased, to recover the sum of \$4,475.90 on a bond executed to the plaintiffs by Philip Peters, Hans Weaver, Robert Phipps, as sureties, and W. F. Owens, as principal, on October 24, 1884, in the penal sum of \$15,000, conditioned that if Owens shall pay on demand the sums of money advanced to him by the plaintiffs then the obligation to be void, and otherwise to remain in full force. The bond also contains a stipulation to the effect that its duration might be terminated on notice to the obligee, after all liabilities thereunder were discharged. The bond purported to be signed by the obligors, "in the presence of Lafayette Owens and T. C. Stearns;" and the former when called as a witness by the plaintiffs testified that he signed the bond as a witness at the request of Owens, but the other parties thereto were not present, nor did he see them sign the same. Stearns was not called.

Weaver and Owens died as stated in the foregoing case, and due demand was made upon their administrators for the balance due the plaintiffs, with similar results. The answer of the defendant was confined to a denial of any knowledge or information of the matters in controversy. On the trial the jury found a verdict for the plaintiffs for the sum of \$3,975.90, on which they had judgment.

The motion for a new trial is based on the same grounds as the one in the Hall case, with the addition of the following:—

It appears that some of the advances to Owens were made after the death of Weaver; and that no notice was given by the administrator to terminate the undertaking of the deceased.

The court instructed the jury that Weaver's estate was liable in the hands of his administrator for these advances, and this instruction is claimed to be erroneous and a new trial asked therefor.

On a careful examination of the authorities I have concluded that whenever the undertaking of the surety is for a definite period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond until notice is given the obligee that the liability is terminated, the estate of the surety in the hands of his administrator is answerable for any default of the principal occurring after his death; and this is especially so where, as in this case, the surety bound himself, his "heirs, executors, and administrators," for the performance of his undertaking. (*The Royal Ins. Co. v. Davies*, 40 Iowa, 469; *Green v. Young*, 8 Me. 14; 22 Am. Dec. 218; *Knott v. Butler*, 10 Rich. Eq. 143; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Mowbray v. The State*, 88 Ind. 327.)

The motion for new trial is denied.

E. M. FREEMAN, LIBELLANT, v. THE STEAMSHIP AUSTRALIA, ETC., THE OCEANIC STEAMSHIP COMPANY, CLAIMANT.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 9, 1888.

1. WHERE A PILOT INQUIRED of the master of an outward bound vessel who was then at the custom-house clearing his ship, whether he required a pilot, and was told by the master that he did not know; *held*, that this did not constitute a speaking of the ship, and a declining of the services of the pilot, such as entitled the latter to half pilotage under section 2466 of the Political Code of California.

Before HOFFMAN, District Judge.

Mr. P. D. Wigginton, proctor for libellant.

Messrs. Lloyd & Woods, of counsel.

Mr. Milton Andros, proctor for claimant.

Mr. Charles Page, of counsel.

HOFFMAN, J. Section 2466 of the Political Code of this state provides that, when a vessel is spoken inward or outward bound and the services of a pilot are declined "half pilotage shall be paid."

The libellant claims to have "spoken" the steamer *Australia* outward bound, and that the offer of his services was declined.

The circumstances under which the alleged "speaking" of the ship occurred, and the offer of the services declined, were as follows:—

On the 2d of March, 1887, while Captain Houdlette, master of the steamship *Australia*, was at the custom-house engaged in clearing his ship for a foreign voyage, he was approached by the libellant, a licensed pilot for this port, who inquired whether he wanted a pilot.

To this Captain Houdlette, according to the libellant's account, replied: "I don't know." Other witnesses testify that he added, "come to the ship and I will tell you."

It is upon this conversation that the libellant relies as constituting a "speaking of the ship" and a refusal by the master to accept his services.

It is clearly proved, that for many years a practice or usage has prevailed in this port, under which the pilots have been accustomed to inquire at the custom-house, of masters of outgoing vessels when clearing their ships, whether they will require the services of a pilot.

This practice is convenient and unobjectionable, when both parties agree to treat such an inquiry as equivalent to "speaking the ship."

But when the pilot claims a compensation under a statute for constructive service, no practice or custom, however inveterate, can absolve him from the duty of bringing himself within the requirements of the law.

To say that an injury at the custom-house, such as that made in this case, constitutes "a speaking of the ship" within the meaning of the statute, seems to be an abuse of terms.

The laws require, not only that the vessel be spoken, but also that the services of the pilot be declined.

In this case, the master did not decline the pilot's offer, if offer it can be called.

He merely replied, that he did not know whether or not he would require his services.

Other witnesses testify, as I have stated, that he told the pilot

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to come to the ship for a definite and final answer I think this discrepancy is immaterial.

On either statement, it is clear that the services were not declined.

I do not mean to say, that if the master had informed the pilot in positive and unequivocal terms that he would not require or accept his services, and that he intended to proceed forthwith to sea without a pilot, this announcement might not be accepted as a waiver of any irregularity in the offer of service, and as relieving the pilot of the duty of making a more formal offer of services, which he was assured would be declined.

But no such response was made by the master, when the vessel was, as is said, "spoken at the custom-house." The master merely informed the pilot that he had not determined whether or not he would take a pilot, and, as he says, directed him to come to the ship for a final answer.

It seems to me plain, that to entitle the pilot to the compensation allowed by law, he should have brought himself within the terms of the statute by making a formal offer of his services, when the ship was about to proceed to sea, and by procuring from the master a distinct refusal to accept them.

WILLIAM H. GEST v. WILLIAM H. PACKWOOD ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 19, 1888.

1. **BONA FIDA PURCHASER.**—One who takes a mere conveyance of another's interest in real property, or a quit-claim thereto, is not a purchaser for a valuable consideration within the rule in equity, which protects such a purchaser against a prior conveyance or right of which he had no notice; for by the very terms of his conveyance he has notice that he is purchasing nothing more than the interest or right his vendor then hath in the land.
2. **IDEM—ANTECEDENT DEBT.**—A purchase of real property, or the assignment of a mortgage thereon for an antecedent debt, does not make the vendee or assignee a purchaser for a valuable consideration, so as to entitle him to protection against a prior conveyance of or right in or to such property.

Before DEADY, District Judge.

Mr. Zera Snow, for the plaintiff.

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Mr. C. P. Heald, for the defendants.

DEADY, J. On November 2, 1878, William H. Gest, a citizen of Illinois, brought this suit against William H. Packwood, T. J. Carter, L. F. Grover, William S. Ladd, and W. J. Leatherwood, to have a certain mortgage on the Eldorado ditch, in Baker County, Oregon, owned by Grover, and two judgments against T. J. Carter in favor of Ladd and Leatherwood, respectively, declared of no effect so far as the plaintiff and said ditch are concerned; and to compel said Packwood and Carter to convey the latter to the plaintiff and account for the rents and profits thereof since May, 1874.

It appears from the bill that on February 15, 1873, the defendants, P. and C., purchased the ditch at a sale on execution to enforce several judgments theretofore obtained by Packwood and C. M. Carter, the latter having assigned the same to T. J. Carter, against the Malheur and Burnt River Consolidated Ditch and Mining Company, the then owner of said ditch. On May 23, 1873, P. and C. assigned the sheriff's certificates of such sale to Arthur T. Rice, the latter agreeing to give his notes therefor to the amount of twenty-nine thousand seven hundred dollars, payable partly to Packwood and partly to Carter, at various dates, the last one falling due on March 1, 1874, which notes were to be indorsed by Clarke, Layton & Co., and in the event of their non-payment, Rice was to reconvey the ditch to P. and C., as security for such payment.

The notes were made, indorsed, and delivered, and Rice went into the possession of the ditch and so continued until May 4, 1874, during which time he operated the same and expended thereon in permanent improvements the sum of fifteen thousand dollars, and paid a large portion of said notes. In July, 1873, no redemption having been made, P. and C. secretly obtained the sheriff's deed to the ditch for the purpose, as it is alleged, of executing the mortgage now held by the defendant Grover to C. M. Carter, in fraud of the rights of Rice.

On May 4, 1875, Rice and Clarke, Layton & Co., and P. and C. made what is called an agreement of lease, reciting therein the agreement of May, 1873, and that all the notes given on the

purchase of the ditch were not paid, whereby Rice leased the ditch and certain other mining property which he had acquired in the mean time to P. and C. for one year, and from year to year thereafter, until certain indebtedness, including the unpaid notes of May, 1873, were paid according to certain specified priorities, out of the net proceeds of the sales of water and the working and sales of mining claims, which proceeds were to be paid by P. and C., monthly, as rent for the property, to J. W. Virtue, as trustee, who was to apply the same on said indebtedness, in pursuance of which lease Rice surrendered the possession of the property to P. and C., but without knowledge of a mortgage to C. M. Carter, which had been executed by T. J. Carter in the mean time, and upon the agreement that when said indebtedness was paid the possession of the property should be returned to him, and P. and C. would execute to him a formal conveyance of the ditch.

On January 4, 1874, T. J. Carter executed a mortgage to C. M. Carter of his interest in one half of said ditch, to secure the payment of his note to C. M. Carter of thirty thousand dollars, of even date therewith, payable in one year, with interest at one per cent a month, which note and mortgage, the bill charges, were given without any consideration and with intent to defraud Rice; that C. M. Carter had both actual and constructive knowledge of the agreement and sale of May, 1873, and that the mortgage was assigned to Grover in April, 1876, without consideration and with the like intent and knowledge.

The bill, under appropriate allegations therefor, prays for an accounting from P. and C., and a conveyance by them to a plaintiff, as the successor in interest of Rice, and Clarke, Layton & Co., in the ditch.

The answer of P. and C. shows that none of the debts secured by the agreement of May 4, 1874, were paid, except some that were paid by Clarke, Layton & Co., and that no proceeds were realized from the ditch or paid to the trustee.

The case rested here until May 9, 1887, when on the application of the plaintiff a receiver of the property was appointed and took possession of the same. On October 14th the defendant Grover had leave to answer the bill, and on October 21st

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he filed a plea thereto, to the effect, that he was a *bona fide* purchaser for a valuable consideration, without notice of the plaintiff's right.

The plea states in substance that on and prior to January 8, 1874, P. and C. pretended to be the owners in common of said ditch, and were, or pretended to be, in the actual possession thereof, free from all encumbrances whatsoever; that on January 8, 1874, C. M. Carter, believing that C. and P. were so seised and possessed of the premises, received from T. J. Carter a conveyance of all his "estate, right, title, and interest, possession, and claim whatsoever," in and to said ditch, to be void on the payment of T. J. Carter's note to C. M. Carter of even date therewith, for thirty thousand dollars, payable in one year, with interest at one per centum a month until paid, but otherwise to be and remain in full force, as a mortgage; that the defendant doth believe and aver that said sum of thirty thousand dollars was then due C. M. Carter from T. J. Carter, for moneys paid and advanced "at and before" that time by the former to and for the latter; that said mortgage was duly recorded in Baker County; that on April 17, 1876, in consideration of certain legal services rendered C. M. Carter by the defendant, between 1861 and 1876, and certain moneys theretofore paid and advanced by the latter to and for the former, C. M. Carter assigned his interest in said mortgage to the defendant in payment of said indebtedness, which services and moneys amounted to more than six thousand seven hundred dollars in value, but said sum was stated in said assignment as the consideration therefor, because the mortgage was not in fact worth any more, but less than said sum; that on February 8, 1879, the defendant commenced a suit in the circuit court for Baker County, to enforce the lien of said mortgage, wherein, on May 19, 1879, a decree was given against T. J. Carter for the amount of the note and interest, which decree was thereby declared a first lien on the premises from the date thereof, and that no payment has ever been made thereon; that the defendant is informed and believes, and so states, that at the date of said mortgage C. M. Carter had no knowledge of any "contractual relation" between P. and C. and Rice and Clarke, Layton & Co., concerning the ditch, by reason

of which any equities affecting said property existed in favor of Rice and Clarke, Layton & Co., and avers that C. M. Carter took said mortgage *bona fide* for a valuable consideration and without notice of the equities asserted by the plaintiff herein; that at the time of the assignment to the defendant he had no notice whatever of any "relations" between said parties "relating" to said ditch, whereby any equities affecting the same existed in favor of Rice and Clarke, Layton & Co., and "insists" that he is a *bona fide* purchaser for a valuable consideration, without notice of the equities claimed herein by the plaintiff.

In the allegations by way of answer in support of the plea, the statements in the plea concerning the good faith of the defendant and his assignor, and their want of notice of the plaintiff's equity, and the consideration in support of the mortgage and the assignment thereof, are repeated.

They also contain denials on information and belief: (1) That on April 4, 1876, the agreement of May 23, 1873, had been or was recorded as alleged in the bill, or that the defendant had any notice of such record or the existence of such agreement prior to such assignment; (2) that on January 8, 1874, or at any time after May 23, 1873, or at all, Rice and Clarke, Layton & Co., or either of them, were in the actual possession of said ditch, and if they were, it was only through P. and C., who had the actual possession as their agents, of which agency neither the defendant nor C. M. Carter had any notice until after the execution and assignment of said mortgage; and (3) all manner of unlawful combination charged and implied against the defendant and C. M. Carter in the bill.

The case was argued and submitted on the sufficiency of the plea.

The origin or nature of the right or title of any of these parties to this water, ditch, and mining ground is not stated or mentioned in the bill or plea. In the absence of anything to the contrary, it may be assumed that the water was appropriated and conducted by means of the ditch between the termini thereof, in accordance with the custom of the district, the law of the state (2 Or. Laws, ch. 60, Mines), and sections 2339 and 2340 of the Revised Statutes.

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By section 3833 (sec. 1 of the act of 1870) and section 3834 (sec. 1 of the act of 1864) of said laws, ditches for mining purposes are declared real property, and "the laws relative to the sale and transfer of real estate" are made applicable thereto. Whether this includes the registration of deeds or conveyances of such ditches may be a question; but as the effect or operation thereof depends to some extent on registration, probably it does.

But even then, neither the contract of 1873 nor that of 1874, although relating "to the sale or purchase" of real property, was entitled to record, not having been acknowledged or proved as provided by statute. (2 Or. Laws, ch. 21, and sec. 3055.)

But an unrecorded deed or contract of sale is good against a subsequent purchaser with actual notice thereof, no matter how obtained. (*Moore v. Thomas*, 1 Or. 201; *Musgrove v. Bronser*, 5 Or. 313; *Baker v. Woodward*, 12 Or. 3.)

A plea that the defendant is a *bona fide* purchaser, without notice, for a valuable consideration, must directly deny the fact of notice and of every circumstance from which it may be inferred. (*Murray v. Ballou*, 1 Johns. Ch. 575.) It should deny notice in the fullest and clearest manner, whether the same is charged or not. (2 Pom. Eq. sec. 785.)

Here notice or knowledge of the alleged equities is denied, but not of the facts out of which it is claimed they arise. For instance, it is denied that the contract of sale of 1873 was duly recorded, which is an implied admission that it actually was recorded. The possession of Rice and Clarke, Layton & Co., as alleged in the bill on January 8, 1874, was enough to put C. M. Carter on inquiry as to the nature and extent of their claim, and was therefore notice to him of all he might have learned by such inquiry. The answer to this allegation is a denial on information and belief that the parties were at any time after May 23, 1873, in the actual possession of the ditch, and an averment that if they had any such possession it was only by P. and C., as their agents. This is insufficient, as being evasive and uncertain.

But the principal points made in the argument against this plea are, (1) that neither the mortgagee, C. M. Carter, nor his assignee, L. F. Grover, appear thereby to be purchasers for a

valuable consideration; and (2) that C. M. Carter, having taken a quit-claim deed from T. J. Carter, is not a *bona fide* purchaser without notice.

In *May v. Le Claire*, 11 Wall. 232, it is held that a purchaser, under a quit-claim deed, is not a *bona fide* purchaser within the rule, which protects such a purchaser from the operation of a prior conveyance or sale of which he had no notice. Notice, sufficient to prevent the purchase from being *bona fide*, is said to inhere in the very form of this kind of a conveyance. (2 Pom. Eq. sec. 753.) In such case the purchaser only takes whatever the grantor could lawfully convey — what there is left in him. To the same effect is the ruling in *Oliver v. Platt*, 3 How. 440. A like conclusion was reached by the supreme court of this state in *Baker v. Woodward*, 12 Or. 10, where it was held that a deed of the grantor's "right, title, and interest" in the land only passed the same subject to any prior disposition thereof.

It is admitted that in some of the states this rule does not prevail. Mr. Pomeroy (2 Eq. Jur. sec. 753, n. 1), without expressing any opinion on the question, gives the cases thereon, from which it appears that the weight of authority is in favor of the rule as announced by the supreme court of this state and the United States, with which agrees my own judgment.

But this court is bound by the decision of the latter tribunal, and in the absence of any controlling authority, would on this question be inclined to follow that of the former.

There is another view of this matter which may be worth considering. It is provided by section 323 of the Code of Civil Procedure that a mortgage shall not be deemed a conveyance, so as to enable the owner thereof to recover possession of the mortgaged premises without a foreclosure and sale. Under this statute, which is but the logical sequence of the equitable doctrine of mortgages, announced by Lord Mansfield in *King v. St. Michaels*, 2 Doug. 632, that a mortgage is only a security, the supreme court of this state has held that a mortgage is only a security, and that the mortgagee acquires thereby no right to or interest in the mortgaged premises. (*Anderson v. Baxter*, 4 Or. 110; *Roberts v. Sutherland*, 4 Or. 222. And see *Witherell v. Wiberg*, 4 Sawy. 232.)

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From these premises the conclusion seems deducible that C. M. Carter acquired no estate or interest in the premises by virtue of his mortgage, but only the right to subject the grantor's interest therein to sale for the satisfaction of his debt, and that his assignee, L. F. Grover, whether he took the assignment with or without notice of the prior equity of Rice, is exactly in the same position.

This equity, to which the lien of Carter's mortgage was subordinate, arose from the sale by P. and C. of the property to Rice on May 23, 1873, whereby he became the equitable owner thereof and they the mere trustees of the legal title for his benefit.

Counsel for the plea, however, maintains that the Carter deed, although technically a quit-claim, is in effect within the ruling in *Van Rensselaer v. Kearney*, 11 How. 322, where it was held that even in the case of "a deed of bargain and sale by release and quit-claim," when it appears on the face thereof that the parties thereto bargained for and about an estate of a particular description or quality, that the grantor and those claiming under him are thereby estopped to deny that he was seized of such estate in the premises at the date of the conveyance.

But in this case the deed contains no evidence that the parties bargained with reference to any particular estate other than the then right, title, and interest of T. J. Carter in the ditch, and that was nothing more than the bare legal title to the undivided half thereof, which in equity and good conscience he then held in trust for Rice, his vendee of the property. Besides the controversy in *Van Rensselaer v. Kearney* was between persons in privity with the parties to the deed in question, and therefore the decision is not applicable to the case under consideration. Certainly, Rice is in no way estopped or bound by the Carter deed, which is subsequent in point of time to his purchase, and to which he is a stranger.

But as it appears from the plea, and was admitted on the argument, that the only consideration for the mortgage or the assignment is an antecedent debt, it must be held bad. Such a debt is not a valuable consideration within the rule invoked by the defendant for his protection against the prior right of the

plaintiff. Where a conveyance is made or a security taken, the consideration of which is an antecedent debt, the grantee or person taking the security is not regarded as a purchaser for a valuable consideration. He has not parted with anything of value. He loses nothing by the transaction, and therefore there is no reason why equity should interfere to protect him against a prior right, although he may have taken such conveyance or security without notice thereof. The only cases cited in which an antecedent debt is held to be a valuable consideration are from Indiana and California. (See *Babcock v. Jordan*, 24 Ind. 14; *Frey v. Clifford*, 44 Cal. 335.) In New York and Massachusetts, the rule is well established that a prior indebtedness is not a valuable consideration in such a case. (*Padgett v. Lawrence*, 10 Paige, 180; 40 Am. Dec. 232; *Wood v. Robinson*, 22 N. Y. 567; *Cary v. White*, 52 N. Y. 142; *Clark v. Flint*, 22 Pick. 243.)

In *Bank v. Bates*, 120 U. S. 556, the supreme court had the question before it for the first time. Mr. Justice Harlan delivered the opinion of the court, in the course of which he refers with deference to the case of *Morse v. Godfrey*, 3 Story, 364, 389, wherein there was a controversy between a bank—the assignee of Godfrey—and his assignee in bankruptcy, concerning certain real and personal property, in which Mr. Justice Story says: “This leads me to remark that the bank does not stand within the predicament of being a *bona fide* purchaser, for a valuable consideration, without notice, in the sense of the rule upon this subject. The bank did not pay any consideration therefor, nor did it surrender any securities, or release any debt due from Godfrey to it. The transfer from Godfrey was simply a collateral security, taken as additional security for the old indebtedment and liability of the parties to the notes described in the instrument of transfer. It is true that as between Godfrey and the bank, the latter was a debtor for value and the transfer was valid. But the protection is not given by the rules of law to a party in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities. But here the bank

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has merely possessed itself of the property transferred, as auxiliary security for the old debts and liabilities. It has paid or given no new consideration upon the faith of it. It is, therefore, in truth, no purchaser for value in the sense of the rule."

Referring then to the cases of *Swift v. Tyson*, 16 Peters, 1, and *Railway Co. v. National Bank*, 102 U. S. 14, in which it was held in the interest of commerce that one who takes negotiable paper, before maturity, in the usual course of business, in payment of or as security for an existing debt, is deemed to have given a valuable consideration therefor, and takes it discharged of all equities or defenses existing between antecedent parties, without reference to his knowledge of the same, Mr. Justice Harlan says: "Do these principles apply to the case of a chattel mortgage, given merely as security for a pre-existing debt, and in obtaining which the mortgage has neither parted with any right or thing of substance, nor come under any binding agreement, to postpone or delay the collection of his demand? Upon principle and according to the weight of authority, this question must be answered in the negative."

"The rules established in the interest of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money."

Some effect is sought to be given to the allegation in the plea that the assignment was made "in payment" of the defendant's demand against the assignor. But the assignment is not set out, nor is it alleged that it was so received, or that the assignor was released or wholly discharged therefrom. Payment of a pre-existing debt may be made by the note of the debtor or that of a third person, but according to the decided weight of authority, a novation does not take place unless there is an express agreement to accept the latter in payment and discharge of the former. Otherwise, the payment is only conditional, and the creditor may, if the note is not paid, surrender it, and sue on his original demand. (*In re Ouimet*, 1 Sawy. 52, and authorities there cited; *The Katie*, 3 Woods, 182.)

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Whether the complete satisfaction and discharge of an antecedent debt without the cancellation or surrender of any written security by the creditor constitutes a valuable consideration, is a question which the courts of the different states have decided differently. Dr. Pomeroy evidently thinks the question ought to be decided in the negative, and says: "To hold that a conveyance as *security* for an antecedent debt is made without, but that one in *satisfaction* of such a debt is made with a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends on mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend on the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is for his interest to picture the transaction. A rule which renders it so easy for an interested party to defeat the rights of others is clearly impolitic."

The plea is bad, and is therefore disallowed.

UNITED STATES v. BATEMAN.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 5, 1888.

1. COURTS—NATIONAL—JURISDICTION—HOMICIDE—WITHIN PRESIDIO MILITARY RESERVATION.—The Presidio military reservation, in the city and county of San Francisco, is not a place "under the exclusive jurisdiction of the United States;" and a homicide committed within the reservation is not an offense against the United States, within the meaning of section 5339, Revised Statutes.
2. SAME.—A homicide committed within said Presidio military reservation is not an offense over which the courts of the United States have jurisdiction.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

Indictment of Thomas N. Bateman for the murder of Samuel M. Soper, first sergeant of troop A, Second Cavalry, U. S. A., stationed at the Presidio military reservation.

Mr. J. T. Carey, United States Attorney, for the United States.

Messrs. Mitchell & Donnelly, for defendant.

By the Court, SAWYER, Circuit Judge. The defendant is indicted for the murder of Samuel M. Soper, alleged to have been committed on July 5, 1887, within the limits of the military reservation, situate within the city and county of San Francisco, and known as the "Presidio." The indictment is found under section 5339, Revised Statutes, which provides for punishing a murder committed "within any fort, arsenal, dock-yard, magazine, or in any other place, or district of country, under the exclusive jurisdiction of the United States." The defendant pleads, that the place where the murder is alleged to have been committed is not within the exclusive jurisdiction of the United States; or within the jurisdiction of the United States; and that the offense charged is not an offense against the laws of the United States, within the meaning of the statute; or an offense over which the circuit court has jurisdiction. The admitted facts upon which the decision must depend are as follows: The place where the offense is alleged to have been committed is within the limits of a military reservation of the United States, situate within the city and county of San Francisco, known as the "Presidio," as it was at the time of the commission of the offense, bounded, surveyed, and established, and actually occupied, by the United States for military purposes, having upon it garrisons, officers' and soldiers' quarters, forts, fortifications, etc., in actual use and occupation for military purposes by officers and soldiers of the regular army of the United States. For thirty-five years prior to the treaty between Mexico and the United States, by which California, including the land in question, was ceded to the United States, and up to the time of their occupation by the United States, the lands within this reservation had been occupied by Mexico as a military reserve, having upon it forts, garrisons, and appurtenances, occupied by Mexican troops for military purposes; and, continuously, from the surrender of these premises by the Mexican forces to the United States down to the present time, they have in like manner been occupied for like purposes by the military forces of the United States. These lands, with all other lands of the state of California, were ceded to the United States by Mexico, by the treaty of Guadalupe Hidalgo, of February 2, 1848. On June 23, 1848, prior to the

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organization of the state government of California, and while under the exclusive sovereignty and jurisdiction of the United States, Captain J. L. Folsom, assistant quartermaster U. S. A., in compliance with instructions given by B. Riley, brigadier-general U. S. A., and military governor of California, dated March 29, 1848, established the boundaries of the said military reservation, which boundaries included the point where the homicide is alleged to have been committed. Afterwards, on November 30, 1848, on the recommendation of the President, a joint commission of navy and engineer officers was appointed for the purpose of examining the coast, with a view to selecting military reservations. Said commissioners, on March 31, 1850, recommended the reservation of the Presidio, with boundaries including the point where the homicide is alleged to have been committed. Thereafter, on November 6, 1850, Millard Fillmore, President of the United States, by an executive order, exempted and reserved from sale, for public services, the last-mentioned tract. Afterwards, by an executive order issued by Millard Fillmore, President of the United States, dated December 31, 1851, which order was confirmed by an act of Congress approved May 9, 1876, the boundaries of said reservation were somewhat modified, but they still include, and they, at all times, included the point at which said homicide is alleged to have been committed. On September 9, 1850, California was, by act of Congress, admitted as a state into the Union, "on an equal footing with the original states in all respects whatever." There was no reservation of sovereignty over any part of the public lands. The only condition was, that there should be no "interferences with the primary disposal of the public lands within its limits," and that the state "shall pass no law, and do no act, whereby the title of the United States to, and right to dispose of the same shall be impaired, or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States." (9 Stats. 452.) The only act of the legislature of California brought to the attention of the court, that can possibly be regarded as affecting the question, is, the act of April 27, 1852, which provides "that the consent of the legislature of California be, and the same is hereby given to the purchase by the government

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of the United States, or under the authority of the same, of any tract, piece, or parcel of land from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy-yards or dock-yards, magazines, custom-houses, light-houses, and other needful public buildings or establishments whatsoever; and all deeds, conveyances, or title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so conveyed may lie; and in like manner may be recorded a sufficient description, by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions, of any public land belonging to the United States, which may be set apart by the general government, for any or either of the purposes before mentioned, by an order, patent, or other official document or paper so describing such land. The consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of Congress in such cases made and provided." (Stats. 1852, 149; 1 Hitt. Laws, sec. 4215.) At the time the homicide is alleged to have been committed, no description by metes and bounds, or otherwise, had been recorded upon the land records of the city and county of San Francisco, as provided for in the latter part of the section quoted. The deceased, Samuel M. Soper, was, at the time of his death, and he had been for some time prior thereto, first sergeant of troop A, Second Cavalry, U. S. A., stationed at the Presido. The defendant was at the same time a private in the same troop, stationed at the same place.

Upon the foregoing state of facts, is the point where the homicide is alleged to have been committed "a place under the exclusive jurisdiction of the United States?" We do not think it is, and not being so, the act is not an offense against the United States, within the meaning of section 5339, Revised Statutes, or an offense over which the United States courts have jurisdiction. This point is authoritatively determined by the supreme court of the United States in the late case of *Railroad Company v. Lowe*, 114 U. S. 525. In that case the reservation at Fort Leavenworth was situate precisely like that

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at the Presidio, at the time of the admission of Kansas into the Union. Says the court:—

“The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the state of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States, for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original states; that is, with the same rights of political dominion and sovereignty, subject like them only to the constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for the retention of the political authority, dominion, and legislative power of the United States over the reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause—inadvertence, perhaps, or overconfidence that a recession of such jurisdiction could be had whenever desired—no such stipulation or exception was made. The United States therefore retained, after the admission of the state, only the rights of an ordinary proprietor.”

These observations are as applicable to the Presidio as to the Fort Leavenworth reservation, as will be seen by reference to the act admitting California. The only reservation relating to the public land affected the proprietary interest of the United States in the lands. That interest was to be in no way interfered with. There was no reservation whatever as to sovereignty, or governmental powers or jurisdiction. There was no distinction made in the act of admission between these lands and other lands constituting the public domain in California. There being no reservation of governmental powers or jurisdiction over the Presidio lands in the act admitting California into the Union, in the language of the supreme court in the case cited, “the United

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States, therefore, retained, after the admission of the state, only the rights of an ordinary proprietor." And again, says the court:—

"The consent of the states to the purchase of lands within them for the special purposes named is, however, essential, under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor."

The United States were both proprietors and sovereigns of the Presidio lands till the admission of the state of California into the Union. By the act of admission, reserving only their proprietary right over these lands, they relinquished to the state their governmental or local sovereign right and jurisdiction, and were thenceforth only proprietors in the sense that any natural person owning land is a proprietor. Having so relinquished their sovereign rights, that condition remains to this day, unless the state has in some way, either directly or by implication, receded to the United States its sovereign jurisdiction. This could be done by direct cession, or by consenting through its legislature to the purchase of land for such governmental purposes, and a purchase for such purposes in pursuance of such consent. Neither has been done in this instance. There is no act directly ceding the jurisdiction. By the act of 1852, as we have seen, the legislature in the proper form consented that the United States might purchase lands for certain specific purposes, including military purposes. But these lands were not so purchased. They were owned by the United States before California became a state, and by her admission into the Union the sovereignty was relinquished. That sovereignty was not receded by the consent of the state to the purchase of other lands for similar purposes. The cession of exclusive jurisdiction over these lands is not within the purview of the act. The act, it is true, in another provision, authorizes the recording of a description by metes and bounds, or other definite description in the land records of the county "of any public lands belonging to the United States, which may be set apart by the general

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government, for any or either of the purposes before mentioned, by an order, patent, or other official document or paper so describing such land." But the purpose or effect of such recording is not prescribed. It may have been intended only for the purpose of affording record evidence of title, as in the case of records of title in parties. There is no statement of a purpose, direct or by implication, to divest the state of its sovereignty over the lands so described and recorded by such record. It is doubtful, at least, whether such a record under this act would have that effect. Such effect should not be given the record, unless that be clearly the purpose of the legislature. But it is unnecessary to determine the effect of such a record now, as none whatever had been made at the time of the alleged commission of the homicide charged. Nothing had then been done under any provision of this act. A subsequent record could not have the effect to now make that act an offense against the United States which was not an offense at the time the act was performed.

We know of no other act of the state of California, through its legislature or otherwise, by which a retrocession of its sovereign jurisdiction over the Presidio military reservation has been made to the United States. The result is, the Presidio reservation is not within the exclusive jurisdiction of the United States, and the acts charged do not constitute an offense against the United States under section 5339, Revised Statutes, or of which this court has jurisdiction. The indictment must, therefore, be quashed on that ground, and it is so ordered.

UNITED STATES v. MASON.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 5, 1888.

1. SEAMEN—DESERPTION—SHIPPING COMMISSIONERS' ACT, SECTION 51 (17 STAT. 262).—The provision of section 51 of the act of June 17, 1872, carried into section 4596, Revised Statutes, relating to shipping commissioners, making desertion an offense, since the passage of the act of June 9, 1874 (18 STAT. 64), has no application to coasting vessels navigating the Pacific Ocean between the ports of San Francisco and San Diego, in the state of California.

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2. SAME—STATUTES—REPEAL BY REVISED STATUTES.—The Revised Statutes, though adopted after the passage of the said act of June 9, 1874, do not repeal the provisions of the latter act.

Before SAWYER, Circuit Judge.

Information for desertion against a seaman.

Mr. Geo. W. Towle, for plaintiff.

Mr. H. W. Hutton, for defendant.

SAWYER, Circuit Judge. This is an information for desertion, against a party who shipped as a seaman on the steamship *Queen of the Pacific*, for a voyage from San Francisco to San Diego, in the state of California, and return. It is framed under section 51 of the shipping commissioners' act of June 7, 1872 (17 Stats. 262), carried into the Revised Statutes in section 4596. No other provision of the statute has been called to my attention, and I am not aware of any, making the acts charged an offense. The act of June 9, 1874, provides that "none of the provisions of an act entitled 'An act to authorize the appointment of shipping commissioners by the several courts of the United States, to superintend the shipping and discharge of seamen engaged in the merchant ships belonging to the United States, and for the further protection of seamen,' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade, touching at foreign ports, or otherwise, or in the trade between the United States and British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage." (18 Stats. 64.) This vessel, going on a voyage from San Francisco to San Diego, in the state of California, is not one of the vessels excepted. The language of non-application is the broadest possible. It is, "none of the provisions" of the shipping commissioners' act shall apply to this vessel or voyage, and the provision under which the offense is charged is one of the provisions of that act, and beyond all question within the provision of the last act quoted. It in effect clearly repeals the prior act with reference to the ship and voyage in question.

The only other possible question is, whether the adoption of the Revised Statutes, with the provisions of the shipping commissioners' act incorporated in them, on June 22d, a few days after the passage of the said act of June 9, 1874, repealed the latter; and the Revised Statutes expressly answer this question in the negative. Section 5601, Revised Statutes, is in the following language:—

“The enactment of the said revision is not to affect or repeal any act of Congress passed since the first day of December, one thousand eight hundred and eighty-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision; and so far as such acts vary in form or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith.”

There can be but one possible construction put upon this provision, and that is, that whatever there is in the revision taken from the shipping commissioners' act, that is in conflict with the said act of June 9, 1874, is repealed. The Revised Statutes are made to take effect from December 31, 1883, and as if passed on that day, “and all other acts passed after that date, although in fact passed before the Revised Statutes, are to be treated and enforced as subsequent statutes, repealing the Revised Statutes, so far as they are inconsistent therewith.” (*In re Oregon Bul. P. & Pub. Co.* 3 Sawy. 616, 617.) I so held, immediately after the passage of the act of June 9, 1874, in the case of a seaman who was convicted for a most atrocious and brutal assault and battery upon the master of a coasting vessel, under the sixth clause of section 4596, Revised Statutes. After conviction, and before sentence, the statute of June 9, 1874, came to hand, and I was obliged to arrest judgment on the ground that the provision had ceased to be applicable to that class of coasting vessels before the commission of the offense. Other courts, so far as I am aware, have uniformly taken the same view of the statute. (*United States v. Bain*, 5 Fed. Rep. 192; *United States v. King*, 23 Fed. Rep. 141; *Burdett v. Williams*, 27 Fed. Rep. 117; *United States v. Buckley*, 31 Fed. Rep. 805; *United States v. The Grace Lathrop*, 95 U. S. 532.)

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For the reasons given, the act charged does not constitute an offense under the statutes of the United States, and the information must be quashed, and it is so ordered.

BAKER v. UNITED STATES.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 5, 1888.

1. COURTS—JURISDICTION—CLAIMS AGAINST UNITED STATES—SURVEYING CONTRACTS.—The act of Congress of March 3, 1887 (24 Stats. 505), provides that where the amount in controversy is between one thousand dollars and ten thousand dollars the circuit courts shall have concurrent jurisdiction with the court of claims of "all claims . . . founded upon . . . any law of Congress, . . . or upon any contract, express or implied, with the government of the United States," etc.; "claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same" being excepted. The complaint upon a surveying contract set out that the surveyor-general of California had approved the field-notes, and certified them, as well as the performance of the work, but that before he forwarded his report to Washington, D. C., he was instructed by the commissioner of the general land office to proceed no further in the matter. Under the terms of the agreement, this report should have gone to the said commissioner, and, if approved by him, been then referred to the auditor for final allowance and payment. *Held*, on demurrer to complaint, that the claim had not been "heretofore rejected or reported on adversely," within the meaning of the act, and that the circuit court, sitting in California, had jurisdiction, the amount sued for being between one thousand dollars and ten thousand dollars.

Before SAWYER, Circuit Judge.

At law. On demurrer to complaint.

Mr. A. P. Van Duzen, for plaintiff.*Mr. J. T. Carey*, United States Attorney, for defendant.

SAWYER, Circuit Judge. This is a suit on one of these surveying contracts—a civil suit to recover the amount due on one of these contracts—the persons connected with which are under indictment in this court for conspiring to defraud the government. The point is made and urged, that the court has no jurisdiction, for the reason that this particular claim has already been passed upon by the land department at Washington, and rejected; and that it so appears upon the face of the complaint.

I do not so read it. The contract is set out in full, and in connection with the other allegations in the complaint, I think a good cause of action is stated. The objection made to the jurisdiction is, that the case stated is not within the terms of the act, as it appears to have been considered and rejected by the proper department.

The act of March 3, 1887, conferred jurisdiction on the court of claims to hear and determine "all claims : . . . founded upon . . . any law of Congress, . . . or upon any contract, express or implied, with the government of the United States," etc., provided nothing in the act shall be construed to give jurisdiction to hear and determine "claims which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same." (24 Stats. 505.) Section 3 gives concurrent jurisdiction to the circuit court over all such claims wherein the amount claimed exceeds one thousand dollars, and is less than ten thousand dollars. I am not fully satisfied what the exception as to a determination or reporting against by a department is intended to embrace. But giving the provision its broadest signification, it only extends to claims "heretofore" acted upon and rejected by the department, that is to say, before the passage of the act; and that does not include the contract set out in the complaint in this action. The complaint does not say that the claim has been passed upon by the department at Washington, and rejected. The surveyor-general was, according to the contract, to approve and certify to the field-notes, and certify to the amount due, and then his approval and certificate were to be sent to Washington, where it was to be considered by the commissioner of the general land office for his approval, and then referred to the auditor for final allowance and payment, so that the auditor was the man to finally pass upon the claim. The averments are that the surveyor-general approved and certified to the field-notes in the proper mode—had approved the field-notes; certified that the work was performed in accordance with the contract, and that the plaintiff is entitled to his money; but that before he forwarded his report to Washington, he received orders from the commissioner of the general land office not to take any further

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action in it, or to report it to Washington. That in consequence of these positive and distinct orders, it had never been forwarded to Washington; consequently the department at Washington whose duty it was to pass upon the claim never did consider and pass upon it, and it never was determined or rejected. On the contrary, by the action of the commissioner, consideration was prevented, and it was not determined or rejected by the proper department before the passage of the act, or at any time. I do not think it comes within the proviso, that excluded from jurisdiction claims "heretofore" determined or rejected by the department, giving the statute the broadest signification. I do not think it comes within the purview of that prohibitory clause, and the complaint states a good cause of action over which the court has jurisdiction.

The demurrer must therefore be overruled, and it is so ordered.

LEVISON v. BALFOUR ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 19, 1888.

1. **FACTORS AND BROKERS—AUTHORITY—CONSTRUCTION OF CONTRACT.**—A direction to sell "Blum's shells; total shipment; not under £85 per ton," does not authorize the consignee to sell parts of the shipment of average quality at or above the limit, and thus throw the part unsold upon the hands of the owner. The consignee is only authorized to sell in one lot, or, at least, to sell the whole in such manner as to realize the price limited for the whole lot.
2. **SAME—EXCEEDING AUTHORITY—LIABILITY TO CONSIGNOR.**—Where a consignee of goods of different qualities is only authorized to sell the whole in one lot, at a limited price per ton, sells a part of average quality at a price above the limit, but does not sell the remainder, he is liable to account to the consignor for the whole at the price limited.

Before SAWYER, Circuit Judge.

At Law. Action by H. Levison against A. Balfour and others.

Messrs. Fox & Kellogg, for plaintiff.

Messrs. Page & Eels, for defendants.

SAWYER, Circuit Judge. Prior to July 30, 1885, Leon Blum had a shipment of three qualities of mother-of-pearl shells,

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amounting in the aggregate to twenty-five tons and a fraction, in the hands of the defendants' Liverpool agents for sale. He transferred the shells to plaintiff, and on July 30th notified defendants of the fact. He introduced plaintiff to Mr. Bruce, one of the defendants, and a verbal arrangement was made between Mr. Bruce, on behalf of the defendants, and plaintiff, to continue them in defendants' hands for sale until they were otherwise disposed of. In the language of the plaintiff, they were to be sold at "£85 sterling per ton for the total consignment." Plaintiff also used the word "telquel," signifying "as is." In the language of Mr. Bruce, defendants were authorized "to sell the total shipment not under £85 per ton," and these statements are corroborated by two other witnesses, Blum and Marshal, who were present. Mr. Bruce made a pencil memorandum of a dispatch to be sent to his Liverpool house, and promised to send Mr. Levison a copy of his dispatch. Accordingly a letter dated on that day was immediately sent by defendants to plaintiff, in which they enclosed copy of invoice and other papers relating to the matter, and said, among other things: "As requested by you, we will cable our Liverpool friends as follows: 'Blum shells; total shipment; arrange at not under £85.' By mail we shall advise Messrs. Balfour, Williamson & Co. that Mr. Blum has transferred the entire shipment to you, and if unsold they will, when called upon, deliver the same to your order on payment of freight and all charges which have been incurred at Liverpool. It is understood that if our friends sell the shells they will charge the usual commission of 2½ per cent, exclusive of brokerage, on the gross amount, in which case you will receive credit for commissions now charged by us on the amount originally advanced to Mr. Blum, and which has this day been paid," the amount so advanced being \$7,000. Defendants on that afternoon sent to their Liverpool firm a telegram as follows: "Blum shells per Bell Rock. Total shipment. Arrange at not under £85 per ton." On September 28th, by letter of that date, defendants notified plaintiff of a sale of four tons of the shells, made up of proportional parts of different qualities. The parts sold were taken from the different qualities of shells in such proportion as to leave the average quality a little higher than, or at

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least fully as high as, the portion sold. The shells sold for £87.10 per ton. The report of sales contained no charge of commissions. They report sales, and in their letter add: "And we trust same will be satisfactory." The plaintiff promptly replied to defendants' said report by letter dated September 30th, in which he says:—

"In reply to yours of 28th instant, I beg to say, that the authority to sell shells ex Bell Rock was 'total shipment' only and not in lots. I reject the affirmance of your advice to me of the 28th instant. I am compelled to hold you to original terms, referring to your letter of July 30, 1885, quoting £85 for the total shipment."

To this letter the defendants replied by letter of same date:—

"We are in receipt of your favor of date, and regret you do not seem willing to approve of our friends' small sale of shells ex Bell Rock. Their advices state that the four tons would be made up of proportionable quantities of the three lots, and as their buyer had good hopes of placing the remainder, they were induced to make the sale. We consider our friends acted entirely for your interest, and on their behalf we decline to view the matter in any other light. As it, however, does not appear that our friends are likely to give satisfaction, we will thank you to instruct your agent to take delivery of the shells—subject to payment of charges which have accrued thereon—and as we shall also request Messrs. Balfour, Williamson & Co. to take no further steps to sell them."

On the same date, September 30th, defendants sent plaintiff a note as follows:—

"Referring to our letter of even date, we now hand you order on our Liverpool house for the delivery of the balance of the shipment of pearl shells per Bell Rock, and enclosed with it an order dated September 30, 1885, addressed to Messrs. Balfour, Williamson & Co., Liverpool, as follows: 'Please deliver to the order of Wm. H. Levison, San Francisco, the balance of the shipment of pearl shells per Bell Rock (ss) on payment of all charges which have accrued thereon.'"

Plaintiff again immediately confirmed his former letter, repudiated said sales, returned the order for balance of shells,

demanding a delivery of the whole consignment of shells, and offered to pay all charges against the same upon such delivery, but refused to receive the said shells remaining after said sale, or less than the whole lot. The defendants, being unable to deliver the whole lot, declined on that ground, and thereupon the plaintiff demanded payment for the whole twenty-five and a fraction tons of said shells, less charges, at the price of £85 per ton, which defendants refused to pay, whereupon this suit was promptly brought, October 17, 1885, to recover the said sum as for a conversion. The account of sales furnished by defendants and introduced in evidence showed sales to the amount of about one ton and a half more than the four tons before reported sold, the same being of an average quality, and at prices above the £85 limit, but this latter was not reported to plaintiff till long after suit was brought.

Upon the facts stated, the question arises whether the defendants' authority to sell was limited to a sale of the whole lot, at a single sale, or whether they were authorized to sell in small lots when opportunity occurred, provided the lots sold were of an average quality, and not sold below the limit of £85 per ton. The terms of the final contract must be regarded as expressed in defendants' letter of July 30, 1885, wherein they give the instructions as telegraphed to their correspondents in Liverpool, viz.: "Blum's shells; total shipment; arrange at not under £85." These are the terms of the contract as finally expressed in writing by defendants themselves, which were accepted by plaintiff by acquiescing without objection upon receipt of defendants' letter, and which he subsequently insisted upon by referring to it as containing the contract in his letter of September 30th, respecting the sale. The rights of the parties must therefore depend upon the construction of the contract as thus expressed. Upon a careful consideration of the contract, I think the reasonable and fair construction of the language is, that the defendants were limited to a sale of the shipment in a single lot at one sale, or that, if they assumed to sell in parcels, even at higher prices, they assumed the risk of being unable to sell the balance at such prices as to make a sale of the whole cargo yield £85 per ton. They were not authorized to sell small lots, and

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throw the remainder which they were unable to sell back upon the hands of the owner; and by so selling a part, without the authority of the owner, and thus putting it out of their power to return the whole shipment, they rendered themselves liable to account for the whole lot at the price limited. That the plaintiff understood that he had by the contract limited the authority to sell in one lot, or at least that defendants should sell all at the price stated, there can be no possible doubt, for that was the construction he put upon it, and insisted upon at all times. He was not a jobber, but a wholesale dealer, and this was manifestly understood by defendants. He was not engaged in selling goods in small quantities, but dealing in whole shipments. That this was also the construction put upon the contract by defendants themselves, there can be no doubt. In their report of sales on September 28th, after stating amount of sales and prices without charging their commissions on the parts sold, etc., they close their letter of advice with "we trust the same will be satisfactory." This would seem to indicate a consciousness of having exceeded their authority, for there was no occasion for this suggestion of a desired approval, if they supposed they had kept within their authority. But plaintiff immediately repudiated the sale as being without authority, calling their attention to the terms of the authority, as expressed in their letter to him of July 30th. The defendants immediately replied, not that they put a different construction upon the language, but urging that their correspondents had, in their judgment, and in the judgment of the defendants, acted, not within their authority, "but entirely for your [plaintiff's] interest;" that they "were induced to make the sale" as their buyer had great hopes of placing the remainder, and added that "since our friends are not likely to give you entire satisfaction, we will thank you to instruct your agents to take delivery of the shells, subject to the payment of all charges which have accrued thereon." Now, this is not the language of parties who feel conscious of having acted within their authority, but rather of expostulation, seeking a ratification because they had acted in good faith, believing their action, though unauthorized, to be for their principal's best interest, and seeking approval on that ground. There is

not the merest suggestion, directly or inferentially, that the defendants did not understand the contract precisely as the plaintiff did. And there is no intimation anywhere in the evidence that the defendants construed the contract differently from the plaintiff, till we come to their answer to the complaint. If they entertained a different view of the meaning of the contract, when they sold in lots and the sale was repudiated, they were here called upon at the time to so state, but they did nothing of the kind. Had they for a moment supposed they had acted within their authority, they would certainly have planted themselves upon this authority, in their first communication, and would never have sought to excuse themselves, and seek approval on any other grounds. It is quite apparent, therefore, I think, that both parties construed the contract alike, and that the construction now sought to be put upon it by defendants is an after-thought. In my judgment, by selling a part, without authority, instead of the whole, and thereby putting it out of their power to return the whole shipment of shells to plaintiff on his demand, the defendants rendered themselves liable to account for the whole shipment at £85 per ton.

There was an attempt to prove that by the custom of merchants at San Francisco, this contract authorized a sale in parcels at or above the price limited. But this, if admissible to prove the fact, would be directly against the construction which both parties, as we have seen, themselves manifestly put upon the contract. Besides, the evidence does not satisfy me that there is any such recognized established custom. The precise case, as stated in the contract in writing, was not stated to the several witnesses, and the evidence, when carefully analyzed, at best only shows, I think, that if the goods are sold in parcels, the whole must finally be sold so as to produce the required amount. I do not think the evidence established the meaning of such contract to be, that the consignee is authorized to sell a part of the goods at or above the limit and throw the balance back upon the hands of the owner. Upon the views I have expressed, the defendants must account for the shells at the rate of £85 per ton, and a recovery must be had for that sum after deducting commissions, brokerage, and other proper charges,

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upon the whole, less commissions already paid on the sum of \$7,000. Of course the loss or gain to defendants will be only the difference between the price limited and the amount for which they ultimately sold the shells, which they had in their possession. It does not appear whether they have sold or not. An offer of £80 per ton for remainder appears to have been made. But upon the view expressed, what the defendants ultimately lose or gain, as the case may be, cannot affect the amount of the recovery. I am not certain that the evidence furnished the means for ascertaining with mathematical precision the amount of commissions and charges to be deducted, and consequently the amount to be recovered. If so, counsel can first agree upon the amount, and it will be inserted in the findings. If not, I will send it to a referee to ascertain the brokerage and charges. The contract fixed the commissions at $2\frac{1}{2}$ per cent, and the evidence shows that commissions on \$7,000 have been paid. Let there be findings and judgment in pursuance of this opinion.

BENKERT v. FEDER ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 26, 1888.

1. **TRADE-MARKS—INFRINGEMENT—MEASURE OF DAMAGES.**—The owner is entitled to recover of the infringer of a trade-mark the profits arising from the sale of the spurious goods, with the trade-mark impressed upon them. He is not limited to the difference between the price for which the spurious goods would sell without, and the price of the same goods with, the trade-mark impressed upon them.

Before SAWYER, Circuit Judge.

Suit for infringement of trade-mark.

Mr. M. A. Wheaton, for complainant.*Messrs. Mastick, Belcher & Mastick*, for defendants.

SAWYER, Circuit Judge. This is a suit for the infringement of a trade-mark, "C. Benkert & Son," used by the plaintiff, doing business under that name, as the successor in interest of a Phila-

delphia firm of which he was an original member, engaged in the manufacture and sale of boots and shoes, upon which the trade-mark was stamped. There is no doubt in my mind, as to the right of the plaintiff as an original owner in part, and successor in interest to the business, to this trade-mark acquired by many years' use (more than a third of a century), and so generally known as to have almost become a part of the public history of the country. And I have as little doubt that defendants knowingly and wilfully infringed by using the words "C. F. Benkert & Son, Phila.," and "C. F. Benkert & Son," on at least two hundred and fifty dozen pairs of boots and shoes sold by them. The boots and shoes so sold were not manufactured by defendants, but purchased from other manufacturers at the East, and then sold by them with the simulated trade-mark of plaintiff stamped upon the soles and on the inside of the boot-top. Such sale is admitted by the defendants in their answer and in the testimony of defendant Feder. It does not appear whether they were so stamped before or after purchase by defendants, but they were sold with the trade-mark stamped upon them.

The defendants insist that the measure of damages or profits should be limited to the difference in price for which the goods would sell with the trade-mark upon them and the price for which the same goods would sell without it. I am unable to adopt any such rule. It would be exceedingly indefinite, and equivalent to giving no damages or profits at all. How would it be possible for any one to say how much less a pair of boots or shoes would sell without, than with the trade-mark upon it? There would be no definite measure of compensation for the injury. One who deliberately and knowingly uses another's trade-mark commits a palpable and unmitigated fraud, for which there is no possible excuse. He seeks to avail himself of the good reputation of another's goods, and puts his own goods, usually, if not always, of an inferior quality, upon the market, thereby not only fraudulently cutting off the market from the party who has by years of labor, and at great expense, established a reputation for his wares, but in addition to this injury, destroys or injures largely that reputation which is the

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foundation of the owner's business, by selling inferior goods under his trade-mark, thereby leading the world to believe that the inferior goods are his. To adopt as the measure of compensation for such injuries the difference between the price for which the spurious goods would sell without the trade-mark and for which they will sell with it imprinted thereon would be a mockery of justice. In my judgment the infringer should at least account for the entire profits made upon the goods wrongfully sold with the trade-mark impressed thereon. And this is the rule established, after mature consideration, in *Graham v. Plate*, 40 Cal. 598; *Sawyer v. Kellogg*, 9 Fed. Rep. 601. There may also be damages beyond the mere profits resulting to the owner of the trade-mark infringed, which he may recover. (See, also, Cod. Trade-Marks, secs. 237, 246.) I do not think there is any just analogy with respect to profits and damages between the infringement of a trade-mark and a patent for an improvement in a machine. A machine may embrace inventions for half a dozen improvements, for each of which there is a patent held by different individuals. One machine might infringe them all. In such case, each would be entitled to recover the profits attributable to his own invention, and not the profits made upon the machine as an entirety. There is no analogy to such a case on the infringement of a trade-mark. The infringer fraudulently attaching another man's property to his own, occasions only a confusion of property with a view of taking advantage of that other's property. The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount. At least that is the fraudulent purpose, and the natural tendency, whether always accomplished or not; and the injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be. The damage may be much more, arising from destroying the reputation of the owner's goods.

Let there be a decree for the complainant in pursuance of the prayer of the bill. Let reference be made to the master to ascertain and report the amount of profits and damages.

CHARLES OLSEN v. GEORGE FLAVEL.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 31, 1888.

1. CONTRIBUTORY NEGLIGENCE IN ADMIRALTY.—Contributory negligence is not a bar to a suit in admiralty for damages on account of a personal injury; and where the fault which caused the same is concurrent or mutual, the court will apportion the damages according to the equity and justice of the case.

Before DEADY, District Judge.

Mr. John H. Woodward, for the libellant.*Mr. C. E. S. Wood*, for the defendant.

DEADY, J. This suit is brought to recover damages for a personal injury suffered by the libellant, while employed as mate on the steam tug Columbia.

It appears from the pleadings and evidence that on January 8, 1887, the defendant was part owner of the tug Columbia, then engaged in towing vessels in and out of the Columbia River, when and for some time before the libellant was employed thereon as mate; that on said date, the Columbia came into Astoria from a cruise on the outside, and laid up at her wharf, when the master went ashore, and left the libellant, with the aid of the two deck hands, to put a few tons of coal aboard, as usual, preparatory to the next trip.

In doing this a gang-plank, about eighteen inches wide, was placed one end on the dock and the other in a sling over the deck of the tug, which was several feet below the dock, and stayed so as to keep it from swaying to either side. The coal was carried out on the plank in iron wheelbarrows, and then dropped down the hatchway into the bunkers.

The libellant wheeled one of the barrows, the handles of which would work up and down three or four inches and cause the barrow to tip from side to side, and on one occasion the libellant thereby lost his balance and fell to the deck of the tug and broke his leg, in consequence of which he was laid up in the hospital and rendered unable to work for a considerable period.

It was customary to coal this tug in this way, and the master, who was fully aware of the fact, did not interfere to prevent it,

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or make objection to it. There was also an iron chute on the dock, by means of which the coal could have been sent down into the hold through a manhole in the deck, but that involved the further labor of moving it from where it fell into the bunkers.

The defense is contributory negligence. In support of it there was an attempt to prove that the libellant was intoxicated at the time of the injury, which failed.

It was also contended that the libellant was not engaged in the performance of his duty as mate when wheeling coal, and therefore the defendant is not liable for the injury thus sustained.

But in my judgment this proposition cannot be maintained. It may be that he might have stood by and seen the two men put the coal aboard without his help. But certainly he was not to blame for "lending a hand," if he was mate. In rendering physical aid in so simple a matter as this, he need not have failed in his special duty, which was the oversight of the business.

And this, I think, is particularly so in the case of a small vessel like the *Columbia*, with a crew outside of the engine-room and pilot-house of only three persons—the libellant and two deck hands—the former of whom had come up from the latter position while in the same employ.

The third point made in support of this defense is that the mate had the choice of methods in putting the coal on board, and that having adopted the dangerous one, he was guilty of negligence, and must bear the consequence. In other words, he might have used the chute or constructed a gang-way of greater width out of the plank at his service, on the wharf; and if the barrows were out of order he might have informed the master of the fact so that others could have been obtained.

Some barrows were exhibited in court, such as the evidence on the part of the defendant tended to prove were used on the occasion, and it was claimed that they were in good condition. They were not broken in any way, and did not appear to be out of order, but on taking hold of them and pressing the handles in an opposite direction, they moved up and down about four inches, owing apparently to the large diameter of the loop at the end of them, in which the axles turned.

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I do not think there was any negligence on the part of the libellant in the use of these barrows, so far as their condition is concerned; but I do think it was dangerous to use them on this narrow plank at so great a distance above the deck. It is true, it was a much more expeditious way of getting the coal into place than by the chute, as it saved one handling of it, besides the wear and tear of the deck. And although a wider way might have been made by the use of another plank, it would have been inconvenient to wheel a barrow on such a surface, with one plank rising and the other sinking under the foot of the wheeler, and the wheel catching in the opening and closing gap between them. Perhaps this difficulty might have been partially avoided by laying down a third plank over the joint between the first two.

On the whole, my judgment is that the libellant is not blameless in this matter. He should have put the coal on with the chute or constructed a safer gangway to wheel on.

But the defendant is not without fault in the premises. This was the usual method of coaling the *Columbia*. The chute was used for special reasons in coaling other tugs belonging to the same management. The master of the *Columbia* knew that she was usually coaled by means of these barrows, and this plank; and that it was being so done on this occasion. He made no objection to the practice, or uttered any warning against it. In this, I think he was quite as culpable as the libellant.

The limbs and lives of seamen are, to some extent, in the care and keeping of the superior skill and intelligence of the master, and he ought not to allow them to use unnecessarily dangerous or risky appliances or methods in the performance of their duties without objection or warning.

Contributory negligence is considered a bar to an action for damages at common law. (2 Thompson on Negligence, 1146.) But a better rule is recognized in the admiralty. Where the negligence is concurrent, or both parties are in fault, courts of admiralty will apportion the damages or give or withhold them in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the case. (*The Marianna Flora*, 11 Wheat. 54; *The Explorer*, 20 Fed.

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Rep. 135; *The Wanderer*, 20 Fed. Rep. 140; *The Max Morris*, 28 Fed. Rep. 881; *Atlee v. Packett Co.* 21 Wall. 389.)

It is true that in *The Chandos*, 6 Sawy. 544, and *Holmes v. Or. & Cal. Ry. Co.* 6 Sawy. 262, it is assumed that in the case of personal injury, contributory negligence on the part of the libellant is a defense to a suit in admiralty for damages. But this question was not raised in these cases. It was not argued by counsel or considered by the court. Neither was it material, as the court did not find there was any contributory negligence in the latter case on the part of the libellant's testate, and only decided that if there was, it could not be taken advantage of, unless it was pleaded. In the former case it was found that the negligence of the libellant was the substantial cause of the injury, and therefore he could not recover damages for it.

This is the first time the question has been made in this court, and I feel justified, in the light of the authorities cited, to follow the leading of my own judgment, and hold that contributory negligence is not a bar to a suit in admiralty, for damages arising from a personal injury. For whatever may be said by the sages of the common law about the difficulty in such cases of determining "whose wrong-doing weighed most in the compound that occasioned the mischief," it is not just to leave a seaman to suffer without redress all the consequences of an injury caused by the fault of his employers as well as his own.

In apportioning the damages the fault of the seaman must not be overlooked; and the effect that should be given to it is suggested by the saying of Mr. Justice Story in *The Marianna Flora*, *supra*: "A party who is *in delicto* ought to make a strong case to entitle himself to *general relief*." But for the allowance of special or partial relief the circumstances of the case are the only guide.

The libellant claims twelve hundred dollars damages for the injury, and damages in the nature of wages from February 1st to the date of decree, at the rate of fifty dollars a month. The libellant was receiving fifty dollars a month on board when he was hurt, and was paid wages in full for January. The nature of the injury sustained does not appear farther than that his leg was fractured. There is no evidence as to the expense incurred

Points decided.

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in his cure, and it is understood that he was cared for in the Marine Hospital without charge.

My judgment is that the libellant ought to be compensated for the loss of his time caused by the injury, and nothing more. The wages he was receiving, with board and lodging, indicate that his time was worth seventy-five dollars per month.

The libellant alleges that he was not yet able to work when he filed his libel—April 22, 1887—while it is averred in the answer that by the middle of April he was as able to work as before the injury. There is no other evidence on the subject.

I find that the time lost after January was two and two-thirds months. This, at the rate of seventy-five dollars a month, makes two hundred dollars, for which sum, and costs and disbursements, the libellant is entitled to a decree.

CHARLES A. NEAL v. JAMES H. FOSTER.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 5, 1888.

1. **CROSS-BILL—RIGHT TO FILE.**—A cross-bill is a mode of obtaining relief or making a defense to which a defendant may resort as against the plaintiff or a co-defendant in the original bill without leave of the court, and the question of his right to file the same when and as it may be done may be made and determined on demurrer.
2. **IDEM.**—Where a cross-bill does not seek to introduce new or further testimony on the matters in issue in the original suit, it may be filed after publication has passed or the testimony thereabout is taken.
3. **IDEM—PUBLICATION.**—As the testimony in equity cases is no longer taken secretly or kept from the inspection of the parties until what was called publication, the mere fact of publication having passed or the testimony being closed in the original suit, ought not to prevent a defendant from filing and maintaining a cross-bill even touching matters in issue in said suit.
4. **RES ADJUDICATA.**—The determination of a point or question in any legal proceeding binds the parties thereto and their privies in any subsequent litigation that may arise between them, although the cause of action in the two proceedings is not otherwise identical.
5. **VENDOR IN POSSESSION — ACTS AND DECLARATIONS OF.**—The acts and declarations of a vendor in possession after the sale are competent evidence against the vendee, on the question of the character and purpose of such sale.
6. **TAXATION OF CREDITS.**—A person cannot lawfully nor truthfully omit a note from his statement of his taxable credits, on the ground that there is an understanding between him and the maker thereof, that he will not deduct the amount of the same from the value of his property listed for taxation.

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7. **MOTIVE OF SUITOR IN NATIONAL COURT.**—The motive with which a person purchases property or a claim has nothing to do with his right to maintain an action thereon or thereabout, in the national courts; and so it does not affect the jurisdiction of said courts if the purchase is made with the expressed intention of suing therein.
8. **LIEN OF JUDGMENT.**—A conveyance of real property, though void as to creditors asserting their right against it, passes all the estate of the grantor in the premises to the grantee, and therefore the lien of a subsequent judgment against the grantor, which only attaches to property then belonging to him, does not affect the property so conveyed; and the creditor first seeking to set aside such conveyance obtains a prior right to satisfaction thereout, from the commencement of his suit for that purpose.
9. **FRAUDULENT CONVEYANCE.**—The grantee in a conveyance of real property by an insolvent debtor, having paid at least three fourths of its cash value therefor, by the redemption of certain wheat warehouse receipts of the grantor, concerning which he was then liable to a criminal prosecution, and the discharge of certain obligations on which he was surety. *Held*, that the circumstances do not warrant the conclusion that the conveyance was made or taken with intent to hinder, delay, or defraud creditors.
10. **SAME.**—A conveyance by an insolvent debtor of a block of brick buildings for the alleged consideration of the surrender of six notes of the grantor for the principal sum of \$16,000, payable to the grantee, which notes are in fact without consideration. *Held*, that the conveyance was voluntary and therefore fraudulent, as against the creditors of the grantor.

Before DEADY, District Judge.

Mr. C. E. S. Wood, for the plaintiff.

Mr. Earle C. Bronaugh, for the defendants.

DEADY, J. The original bill in this case was filed on July 1, 1886, against James H. Foster, John A. Crawford, William Crawford, Ashby Pearce, John R. Baltimore, J. S. Liles, E. Walden, and W. H. Goltra, and the object of it was to have certain conveyances of real property situate in Albany, Linn County, theretofore made by Foster to the Crawfords and Ashby Pearce, set aside as fraudulent.

The other parties, including Goltra, were made defendants in the bill, because they were, or claimed to be, judgment creditors of Foster's, and in their answers they set up their claims accordingly. The Crawfords and Foster answered the bill, denying that the conveyances were fraudulent. The plaintiff replied; and on October 7, 1886, the case was referred by the circuit judge to a master, who on August 29, 1887, filed his report of the evidence taken by him and also his conclusion of fact and law thereon, as directed by the order of reference.

In his answer Goltra states that in February, 1886, he obtained judgment in the state circuit court for the county of Linn, against Foster, on divers claims, for the sum of \$16,118.84, for which he claims a lien on the property in question.

On November 14, 1887, the defendants, Foster and John A. and William Crawford, had leave to file, what is styled therein, "a supplemental cross-bill," in which it is alleged as a bar to Goltra's claim to enforce his judgment against the property in question, that on February 10, 1886, he commenced a suit in the state circuit court aforesaid against the plaintiffs in the cross-bill to enforce the lien of his judgment against the property in question, on the ground that the conveyances thereof by Foster to the Crawfords were fraudulent, because made with intent to defraud Goltra and other creditors of Foster; that the defendants in said suit answered the complaint denying the allegations of fraud, and averring that the conveyances were made in good faith and for an adequate consideration; that Goltra filed a reply to this answer, and upon the issue thus raised the cause was, on July 9, 1886, heard by said court, which found that the conveyances in question were made to the Crawfords in good faith and for an adequate consideration, and decreed that the bill be dismissed and the defendants recover their costs; that Goltra appealed from said decree to the supreme court of the state, where, on April 11, 1887, said appeal was by the order of said supreme court dismissed, at the cost of the appellant, whereby the decree of said circuit court of July 9, 1886, remains in full force and effect and is now binding between the parties thereto.

On December 31, 1887, Goltra demurred to the cross-bill. On the argument the objections made to the filing of the bill, when the application was made therefor, were restated and insisted upon. The point was also made that the cross-bill does not state the facts of the original bill.

The bill states the commencement of the original suit, giving the date thereof and the names of the parties thereto, and adds, "the object and purpose of said original bill being as therein stated and prayed."

The proceedings on the original bill are then stated as above,

down to the filing of the master's report, to which is added the allegation that Goltra was made a defendant in the original bill, as one of the creditors of Foster, while his interest was that of a plaintiff, and by said bill and the report of the master, Goltra is represented as being entitled to share in the proceeds that may accrue to the creditors of Foster by virtue of any decree of this court in the original suit.

It is said that the cross-bill should state the original bill of the parties, prayer and object of it, the proceedings thereon, and the right of the plaintiff therein, which is sought to be made the subject of the cross-litigation. (Story on Equity Pleadings, sec. 401; Adams' Equity, 403.) In England, where this rule had its origin, a cross-bill might have been filed in another court than that in which the original was pending. (Story on Equity Pleadings, sec. 400.) In such case it would be necessary to set forth the matters in the original bill and its prayers and object, together with the proceedings thereon, if any, so that the court might be possessed of the whole case, of which the cross-bill is only a part. But this practice never obtained in this country. In the national courts at least the cross-bill must, from the necessity of the case, be filed in the circuit court where the original bill is depending.

In such case there is no necessity of bringing the facts of the original bill, or its object or prayer, to the attention or knowledge of the court by repeating them in the cross-bill, and a mere reference to the bill, which is already before the court, and a part of the case, is sufficient for all practical purposes. Of course it is necessary to set forth in the cross-bill so much of the matter in the original bill, and the subsequent pleadings and proceedings thereon, as may be necessary, to show what right or defense is sought to be brought before the court of adjudication, and to make a proper case therefor.

This has been done in this case. Goltra, a defendant in the original bill, but whose interest in the suit is that of a plaintiff, seeks by his answer, in case the court should find that the conveyances by Foster to the Crawfords are void, as to the creditors of the former, and order a sale thereof, to have his judgment against his co-defendant Foster satisfied out of the proceeds of

the property. And now his co-defendants in the original bill, Foster and the Crawfords, seek by the cross-bill to set up, as against him, the defense of a prior adjudication by the state court, as between them, of the question of the validity of the conveyances.

It is admitted that the defense as stated is a bar to the demand of Goltra to have his claim satisfied out of the proceeds of this property—that having litigated the question of the validity of the conveyances of the same, as against the creditors of the grantor in the state court with him and his grantees, the Crawfords, he is estopped to allege or claim anything to the contrary of the decree in that suit.

A cross-bill is generally considered and used as a matter of defense, and may answer the purpose of a plea *puis darrein continuance*, where the matter of the defense arises after answer. A cross-bill is either brought against the plaintiff in the original bill or one or more of the defendants therein; and the original and cross-bill are considered one cause. (1 Smith's Ch. 459; Story on Equity Pleadings, 389, 393; Adams' Equity, 402; *Field v. Scheiffelin*, 7 Johns. Ch. 252; *Cross v. De Valle*, 1 Wall. 14.)

It is also maintained that the cross-bill is filed too late; and that nothing has arisen since the commencement of the suit which would justify its filing. This point was made and argued on the application for leave to file the cross-bill; and it is contended that the question cannot now be raised again on the demurrer. But the rule is otherwise. It was not necessary to give notice of the application for leave to file a cross-bill; nor, so far as I am advised, to obtain leave before doing so. The only case I have found on the subject is *Bronson v. La Crosse Railway Company*, 2 Wall. 283. There a cross-bill filed without leave of the court was set aside as irregular. But it was filed by a person not a party to the suit, who petitioned the court for leave to answer for a defendant corporation, then in default, of which he was a stockholder, and also to file a cross-bill. Leave was given to file the answer, but as to the cross-bill the order of the court was silent. The party filed the answer for the corporation and also a cross-bill, which was subsequently set aside because filed without leave by a stranger to the suit.

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A cross-bill is a regular and legitimate proceeding in a court of equity, to which any party defendant may resort in a proper case, without any special leave of the court. But in doing so, he must conform to the law or rule which governs the case, or take the consequence. Story says (Eq. Plead. sec. 632): "A cross-bill will be open to a demurrer if it is filed contrary to the practice of the court, and under circumstances in which a pure cross-bill is not allowed." And as an illustration, he cites the case of a cross-bill filed after publication of the testimony in the original suit, which seeks to introduce new testimony as to matters already in issue therein.

It is generally stated in the books, that a cross-bill must be filed before publication—that is, before the taking of testimony in the original case is closed and the same opened to the inspection of the parties or published—unless where some new matter, as a release, arises afterwards, or the case appears at the hearing too imperfect to reach and settle the rights of all the parties.

As an illustration of the reason of this restriction, Chancellor Kent, in *Field v. Scheffelin*, 7 Johns. Ch. 253, says: "It is too late, after publication, to introduce new and further testimony to the matter in issue by the contrivance of a cross-bill. It would be doing, in an indirect way, per *obliquum*, what is forbidden to be done directly"—referring to *Hamersley v. Lambert*, 2 Johns. Ch. 432.

The reason given for this is, that if after the publication of the testimony, and the defendant has found out wherein it is defective, he was allowed to supply the same by suppletory proof taken on a cross-bill, there would be great danger of perjury and fraud. (*Field v. Scheffelin*, 7 Johns. Ch. 254; Story on Equity Pleadings, sec. 395.)

But the fact on which this artificial superstructure of caution and prevention is raised has long since ceased to exist in the courts of the United States. At one time all testimony taken in a suit in equity was taken by examiners or commissioners on written interrogatories, and neither the parties nor their attorneys were allowed to be present at the examination, while the persons before whom the testimony was taken were sworn to

secrecy. (1 Smith's Ch. 40, 356-359, 361-374.) The testimony was then returned into court, sealed up, and remained so until the taking of testimony in the case was closed, when an order of publication was passed and the depositions were opened.

Now, however, under equity rule 67, the testimony may be taken orally before an examiner in the presence of the parties and their attorneys, who propound the interrogatories, and when taken on commission and written interrogatories the depositions may be, and usually are, opened and inspected as soon as returned to the clerk's office. In other words, there is no longer any secrecy in the premises, and there is now no reason why the period or fact of publication should be arbitrarily prescribed as the point of time beyond which a cross-bill cannot be filed. The court may, *sua sponte*, direct the filing of a cross-bill when it appears necessary to a complete determination of the case, at any time before final decree; and, in my judgment, there ought to be no fixed rule against a defendant's filing a cross-bill in a proper case before the final hearing—the objection of laches being disposed of in each case on the particular circumstances thereof, or by rule of court or the supreme court.

But even under the old state of things the objection to filing a cross-bill after publication had passed was really confined to cases, or, at least, the reason given for it would so confine it, where the cross-bill sought to introduce new or further testimony concerning the matters already in issue. (Forum Romanum, 46.) But this bill seeks nothing of the kind. It sets up a prior determination between the plaintiffs therein and the defendant Goltra, of the question of the validity of the conveyances to the Crawfords, a matter which is not mentioned in the original bill or the answers thereto, and about which no testimony could have been taken, and concerning which there can be no danger of perjury, for it must be proved, if at all, by the record.

The application for leave to file the cross-bill was placed on the ground that the defense did not arise until April 11, 1887, when the suit of Goltra against Foster and the Crawfords was finally determined in the supreme court, by the dismissal of the appeal, and therefore it was in the nature of a plea *puis darrein*

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continuance. This conclusion was based on the theory that the decree of the state circuit court in *Goltra v. Foster et al.* was suspended during the appeal and could not be used as an estoppel while the appeal was pending, according to the ruling in California under a similar statute, which declares that "an action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal." (Or. Code. Civ. Proc. sec. 505. See *Sharon v. Hill*, 11 Sawy. 302.) But the supreme court of the state in *Day v. Holland*, 15 Or. 464, have since held otherwise, and said in effect that the decree of the lower court was operative for all purposes during the appeal, as well as the period allowed for taking it. And so in the light of this decision the right to file the cross-bill cannot be rested on this ground.

It may be taken for granted that the plaintiffs in the cross-bill could not have the relief prayed for therein as against their co-defendant Goltra, by answer or otherwise than by cross-bill.

The filing of the bill took place before the cause was submitted for final hearing. It sets up a simple, distinct defense against Goltra's right to have his judgment satisfied out of this property. As it rests on an alleged record, the determination of its truth or sufficiency cannot materially delay or prejudice the final disposition of the case. Under the circumstances, I do not think the demurrer to the bill ought to be sustained on the ground of delay in filing the same. Some other causes of demurrer are assigned, but as they were not noticed in the argument, and do not appear to be material, they need not be considered.

The demurrer is overruled.

AUGUST 20, 1888.

DEADY, J. The plaintiff in this case sues as the assignee and owner of two certain judgments against the defendant Foster, and to set aside, as fraudulent, three certain conveyances executed by Foster to John A. Crawford, William Crawford, and Ashby Pearce, respectively. William H. Goltra, E. Walden, John R. Baltimore, and J. S. Liles, citizens of

Oregon, and judgment creditors of Foster, are also made parties defendant.

It is alleged in the bill that on and prior to February 6, 1884, Foster was indebted to Sibson, Church & Co. in the sum of \$13,034.96, which claim was on July 15, 1885, assigned to Sibson, Quackenbush & Co., who, on March 8, 1886, obtained judgment thereon for \$14,066.72, in the circuit court of Linn County, Oregon, which judgment was then docketed therein, and on March 15th, an execution issued thereon and was returned unsatisfied; that on June 11, 1886, Sibson, Quackenbush & Co. sold and assigned said judgment to the plaintiff, who now owns the same.

That on March 8, 1886, Noon & Co. obtained a judgment in said circuit court against Foster, on a promissory note and account for goods in the sum of \$1,920.35, which judgment was then docketed therein, and on March 15th an execution issued thereon, and was returned unsatisfied; and that on June 19th Noon & Co. sold and assigned said judgment to the plaintiff, who now owns the same.

That when said debts were contracted on which said judgments were obtained, Foster was the acknowledged owner of the following real property situate in Albany, in said county and state: (1) The Magnolia flour mill and lot, including the race connecting the mill with the Santiam water ditch; (2) block 55, except two lots; (3) lot 1 in block 11; (4) one-half interest in the Albany water works; (5) a parcel of land 74 feet by 100, with brick buildings thereon; and (6) part of lot 7 in block 4, with a brick store thereon. That on February 6, 1884, Foster conveyed all of said property except the fifth and sixth items to the defendant, John A. Crawford, and on the same day conveyed the fifth item to the defendant, William Crawford, and on February 7th, conveyed the sixth item to the defendant, Ashby Pearce; that each of said conveyances was voluntary and without consideration, and was made by the grantor, and accepted by the grantee therein, with intent to hinder, delay, and defraud the creditors of Foster, and particularly the assignors of the plaintiff, Sibson, Quackenbush & Co., and Noon & Co.; that Foster is insolvent; that the property ~~on removed~~ was then worth \$110,000, and was all the property

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Foster had; and he is still in the possession and enjoyment of the same.

That subsequent to said conveyances the other defendants herein obtained judgments in said circuit court against Foster as follows: Baltimore, March 10, 1884, for \$1,652.92; Goltra, February 23, 1886, for \$1,636.90; Liles, March 12, 1886, for \$1,049.75; and Walden, February 23, 1886, for \$568.50.

The prayer of the bill is, that the conveyances be set aside as fraudulent, and the property be sold to pay the claims of the plaintiff and the defendants, Baltimore, Goltra, Liles, and Walden, according to their respective priorities.

The defendants, Foster and the Crawfords, by their joint answer admit the judgments against Foster as stated in the bill, but deny that the plaintiff is the owner of any of them, and allege that the assignments thereof to him by S. Q. & Co. and N. & Co. were made without consideration and for the sole purpose of giving this court jurisdiction. They admit the execution of the conveyances to the Crawfords and Pearce, as stated in the bill, but deny that they are voluntary, or were made or accepted with intent to hinder, delay, or defraud creditors, and allege that at the date thereof Foster was short about 20,000 bushels of wheat, for which he had given receipts, and that Foster conveyed the items 1, 2, 3, 4, and 5 of said property, and certain book accounts and grain sacks, to the Crawfords, in consideration of John A. Crawford's taking up those receipts; and \$64,000, to be paid him by the surrender of certain notes and an account due from Foster to said John A.; and certain other notes due from Foster to William Crawford; and the payment by John A. of certain notes of Foster's on which he was surety; and that the conveyance to Pearce was made subject to Mrs. Foster's right of dower, in consideration of the payment by him of \$4,000 as security for Foster.

They admit that on, prior and since February 6, 1884, Foster was and is insolvent, and aver that the property conveyed is not worth more than \$56,000.

The defendants—Baltimore, Liles, Walden, and Goltra—answer the bill jointly, admitting the allegations thereof, and that they are severally the owners of the certain judgments

obtained by them in 1886, in the circuit court of Linn County, Oregon, against Foster, as alleged in the bill; and also allege that Goltra is the owner of a certain other judgment obtained by him in said circuit court, on February 23, 1886, against said Foster, on twelve promissory notes and one account theretofore assigned to him, for the sum of \$16,119.70, which judgments they allege are each a lien on the property of Foster in said county; and that the property conveyed to the Crawfords and Pearce was so conveyed with intent to hinder, delay, and defraud the creditors of Foster, including the defendants.

Afterwards the defendants, Foster and the two Crawfords, filed a cross-bill, alleging therein that on February 10, 1886, Goltra commenced a suit in the circuit court aforesaid against the plaintiffs in the cross-bill, to enforce the judgment for \$16,119.70 theretofore obtained against Foster, as stated in his answer herein, against the property in question, on the ground that the conveyances thereof by Foster to the Crawfords and Pearce were invalid, because made with intent to hinder, delay, and defraud the creditors of the grantor, including Goltra and his assignors; that the defendants in said suit answered the complaint therein, denying the allegations of fraud and alleging that said conveyances were made in good faith and for an adequate consideration, to which answer there was a reply by Goltra; that the cause was heard on the issue thus made, when the court, on July 9, 1886, found in favor of the defendants and dismissed the suit; that Goltra took an appeal to the supreme court of the state, where, on April 11, 1887, said appeal was dismissed, whereby the judgment of said circuit court remains in full force and effect, and Goltra is thereby estopped to say that said conveyances are invalid, for the reason assigned.

A demurrer to this cross-bill was overruled, and the same taken for confessed. (*Ante*, 34 Fed. Rep. 496.) And it is now admitted by counsel that Goltra is estopped to say in this suit, in support of said judgment, that these conveyances are invalid, because made in fraud of creditors.

But counsel maintain that the judgment of Goltra, obtained on February 23d, for \$1,637.20, is not within the operation of said estoppel, because the judgment was not included in the suit

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out of which the estoppel arises. It is true that the decree in the former case between the parties to the cross-bill was given in a suit in which the right to enforce this particular judgment against this property was not involved. But the question on which such right depends was so involved. A question contested and determined in one case is determined, so far as the parties to the same are concerned, for all time and all purposes. It cannot be ground over again in another action.

The question of the validity of Foster's conveyances to the Crawfords and Pearce, for the cause alleged, namely, that they were executed with intent to hinder, delay, and defraud creditors, was the principal and only contested question in the suit of *Goltra v. Foster and the Crawfords*, and the decision therein that they were not so executed, estops the parties and their privies to allege or maintain aught to the contrary, in this or any other litigation between them. (*Outram v. Morewood*, 3 East, 346; *Cromwell v. County of Sacramento*, 94 U. S. 351; *Wilson's Exr. v. Deen*, 121 U. S. 525; *Bigelow on Estoppel*, 48; *United States v. Schneider*, 35 Fed. Rep. 107.)

This disposes of the case made in the cross-bill. Goltra is estopped to allege or contend that the conveyances in question are fraudulent. That identical point was found against him in the former suit, and therefore, as against Foster or his grantees, he cannot make or state a case that will entitle him to subject the property to the satisfaction of either of his judgments against the former.

In the progress of the case it was referred by the circuit judge to a master, to take the testimony and report the same with his conclusions of fact and law thereon. The report finds, (1) that at the commencement of this suit the several judgments mentioned in the pleadings were owned by the plaintiffs therein, except those of Noon & Co. and Sibson, Quackenbush & Co., which had been theretofore duly assigned to the plaintiff, who was the owner thereof; (2) that the conveyances to Pearce and John A. Crawford were made in good faith and for "full value," while that to William Crawford was made without consideration, and is void as against the plaintiff and other creditors of said Foster; (3) that on February 6, 1884, the date of said convey-

ances, and since, Foster was insolvent and has no property out of which any of such judgments can be made; (4) that the real property conveyed to John A. Crawford was at the date of the conveyance thereof worth \$36,000, in addition to which he then received from Foster accounts and grain sacks worth \$6,000—in all \$42,000—and that Foster then owed said Crawford on notes and accounts \$27,733.50, while the latter was liable to pay for the former, as surety, about \$16,000, all of which debts and liabilities he released and paid, and also made good to sundry persons a deficiency in wheat in the mill warehouse of near 20,000 bushels, which cost him near \$10,000 more—in all, \$53,733.50; (5) that at the date of the conveyance to Pearce he was an accommodation indorser for Foster on a note for \$5,000, that he afterwards paid; that the real property conveyed to him was worth \$3,500, in addition to which he received \$700 worth of mill products; that the property conveyed to William Crawford was then worth \$18,000, upon which he has since expended in permanent improvements the sum of \$2,000.

Both parties excepted to the master's report, the plaintiff to the finding in relation to the conveyances to John A. Crawford and Pearce, and the defendant, William Crawford, to the finding concerning the conveyance to himself.

On the argument, it was tacitly conceded that the conveyance to Pearce was made for a full consideration, as found by the master, and with no other purpose than to prefer him to other creditors, as the grantor lawfully might, and of this there can be no doubt on the testimony.

At and before February 6, 1884, Foster was in a financial strait. By reason of a decline in flour during the winter he had lost or failed to realize \$1 a barrel on about 30,000 barrels shipped to Liverpool. He was also short about 20,000 bushels of wheat, for which he had given receipts, on any one of which he was liable at any moment to a criminal prosecution. There is no room to doubt that John A. Crawford was then liable as surety on Foster's paper for \$15,900, namely, to the Bank of British Columbia, \$5,000; to John Conner and the Bank of Albany, \$6,000, and to Frank Parton, \$4,900; and that he afterwards paid the same, as part of the consideration for the transfer to him.

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Neither is there any room to doubt that Crawford settled with the farmers and others, holding Foster's wheat receipts for 19,541 bushels of wheat, that the latter had used. But the amount disbursed for this purpose is not certain. The evidence on the point is not clear or satisfactory. Wheat, at the time of the transfer, was ninety cents per bushel. But it was rapidly declining and soon fell to near fifty cents. It is altogether probable that from \$10,000 to \$15,000 was paid out for Foster on this score—say \$12,500. This, added to the amount paid by Crawford, as surety or indorser, makes \$28,310 paid on the property in cash. In addition, Crawford claims to have turned in an open account of \$5,803 against Foster, as a part of the consideration for the purchase. Under the circumstances the claim is a probable one. Crawford seems to have been carrying Foster in every direction. And on the proof, it cannot be rejected. This with the cash makes a consideration of \$34,113 paid for the property, real and personal, more than it would have probably sold for at sheriff's sale, and more than three fourths of the value that the master places upon it, which in my judgment is its full market value.

If the purchase was made in good faith, that is, for the purpose of providing for the payment of the debts due the purchaser or the obligations on which he was surety for the grantor, and not merely to hinder, delay, and defraud creditors, the conveyance is not within the statute of frauds, and is valid. The amount and character of the consideration is not material, except as it may affect the question of good faith. (Bump, F. C. 207.) Neither the amount nor character of this consideration tend to prove that the purchase was not made in good faith.

The only specific circumstance urged against the good faith of this transfer, is the fact that Foster remained in possession of the mill and dwelling-house, and his declarations while there. The acts and declarations of a vendor in possession after the sale are competent evidence against the vendee on the question of the character and purpose of such sale and possession. (Bump, F. C. 569; *United States v. Griswold*, 7 Sawy. 316.) But such acts and declarations are not conclusive, and must be considered in the light of all the circumstances. Mr. Foster was an old

man who had done business in Albany as merchant and miller for over thirty years. When he failed and transferred his property to his life-long friend and principal creditor, John A. Crawford, it was not unreasonable nor out of the ordinary course of business, for the latter, who was over seventy years of age, and had been out of the milling business for many years, and was otherwise much engaged, to retain Foster as superintendent of the mill, both for his own interest as well as a kindly consideration for Foster, who was then thrown on the world without any visible means of support, at a compensation of \$75 per month, and the use of the dwelling-house in which he lived. But Foster's declarations to his other creditors, all of whom are represented in the several judgments mentioned in the pleadings, do indicate that he expected to get the mill back again, either as owner or lessee of Crawford, in which case, if times "livened up," he would be able to pay all his debts from the profits of the mill. But I am satisfied he either went beyond the fact, or his hearers, smarting under the loss of their claims, have remembered and repeated his statements for more than they were worth. As is said by counsel in the brief for plaintiff, "each of these witnesses was not only a friend of many years' standing with Foster, but also a creditor. Some of them had sold him wheat only a few days before the transfer; and in the presence of men whom he had so wronged . . . and who, nevertheless, still displayed some old-time loyalty and friendship towards him, it is quite natural he should seek to placate them, and restore himself in their esteem by an explanation that would not leave them hopeless."

Under these circumstances, Foster might have made statements and held out hopes that implied in the willing minds of his anxious hearers that after all the transfer was only a contrivance to tide over a financial difficulty, and in the mean time Crawford was only holding the property in trust for him.

One form of declaration attributed to him is, "that if he could make arrangements with his creditors he could lease the mill and pay them off if times 'livened up' out of the profit of it." And this declaration is perfectly compatible with a *bona fide* sale. Neither would it be difficult or extraordinary for those

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who would have it so, to remember and relate how Foster said "he was going to get the mill back again as soon as he could arrange with his creditors," with the implication, of course, that such was the purpose of conveying it to Crawford.

However this may be, there is nothing in Foster's possession or presence at the mill or employment by Crawford inconsistent with good faith on the part of the purchaser. And so far as any of his declarations import the contrary, assuming that he has been correctly reported, they are easily accounted for, and are also contradicted by the admitted and controlling circumstance of the case.

The evidence as to whether Crawford also turned in Foster's three notes in part payment of this property is conflicting, but I think the weight of it is that he did.

Crawford and Foster both swear that in 1876 the mill firm of James H. Foster & Co.—the company being the brother, John Foster—dissolved, and James H. took the business and agreed to pay the debts. At that time Crawford held three notes of J. H. Foster & Co., dated early in July, 1875, for an aggregate sum of \$12,593, with interest. The notes are produced, and their existence is satisfactorily established. On April 28, 1876, on a settlement with Crawford, Foster gave his two individual notes for the three company notes and interest, payable one day after date, with interest at ten per centum per annum, the one for \$8,605, and the other for \$5,325, or \$13,930 in the aggregate; and on September 12, 1878, Foster gave Crawford another note for \$3,000, payable one year after date, with like interest, for money then loaned him. On the first of these notes there is indorsed a payment of \$1,721 of interest, dated April 27, 1878, and on the second, a like payment, at the same date, of \$1,065. On the third note there is an indorsement of \$350, dated June 19, 1882, which was afterwards canceled. No other payments appear to have been made on either of these notes prior to February 6, 1884, when it is claimed they were returned to Foster in part payment of this property. The notes are produced, and I think there is no doubt that they are genuine. There appears to have been a sufficient reason for their making. The old notes were partnership ones, that James

H. Foster had promised his brother to take up, which he did by giving his own in their place.

The contention of the plaintiff is that, admitting their genuineness, they were paid some time, but he cannot say when, before the transfer of the property, when they were fraudulently revived for the purpose of being made a part of the consideration of such transfer.

Both Crawford and Foster swear positively that the notes were due and unpaid according to their face at the time of the transfer, and that they constituted a part of the consideration therefor, and there is no direct evidence to the contrary. But there are some circumstances in the case which contradict them with more or less force.

It is very unusual that notes of this amount—\$16,930—are allowed by business men to go unpaid and unsecured for a period of twelve years, and that without the payment of interest for the last two thirds of that time. Still the matter is not so improbable as to prevent belief, when supported by the direct evidence of the parties.

On September 24, 1881, Crawford stated under oath, in writing, to the assessor of Linn County, that the notes then owned by him and liable to taxation in the state only amounted to \$5,500. On June 7, 1883, he made an affidavit to procure a decrease of his assessment for 1882, in which he stated that the gross amount of his "money, notes, and accounts" subject to taxation was only \$13,500.

Crawford's explanation of the apparent omission in both these statements of these three Foster notes is, there was an agreement between himself and Foster, that on account of the interest on these notes being ten per centum instead of twelve, the maximum allowed by law, the latter would pay the taxes thereon, that is, he would not deduct the amount from the value of his property assessed for taxation.

The explanation is open to the criticism that it is easily made and hard to contradict. But counsel says, if it is not true, the record of the assessments for the county will show it, at least negatively; and as the plaintiff has not produced this evidence, as it was in his power to do, the presumption is that it would

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so far corroborate the testimony of the defendants. At first blush this seems plausible, but if the fact is, as the plaintiff claims, these notes were paid, the record of the assessments would equally show that Foster did not deduct this indebtedness from his assessment, not for the reason given, but because it did not exist, at least from the time of such payment.

It may be admitted that a debtor and creditor may honestly make an agreement by which the former agrees not to deduct his indebtedness to the latter from the value of his property assessed for taxation, in consideration of which the creditor may honestly conclude that such indebtedness need not be returned by him for taxation as a credit liable thereto. Most persons are disposed to construe the law so as to keep out of the assessor's books as much as possible. But the law is otherwise, except in the case of a note secured by mortgage since 1882, and the creditor, when called on to swear to the amount of credits belonging to him and subject to taxation in his hands, cannot lawfully or truthfully omit such credit from his return. But Crawford may have believed that the Foster notes held by him under the agreement stated were not liable to taxation *eo nomine*, because a tax on the value of the same was being paid by the debtor, as a condition of the credit. And therefore, while the failure of Crawford to return these notes for taxation is some evidence that they did not then exist as a legal obligation against Foster—a living credit subject to taxation—it is neither conclusive nor cogent on that point.

The defendant Goltra also testifies that in June, 1883, in talking with Crawford about Foster's financial condition, he said, "People think that Foster owes you considerable, or you have an interest in the mill," when Crawford said, "He neither owes me, nor have I any interest in the mill." It is admitted he had no interest in the mill, and Crawford denies that he said Foster owed him nothing; and all things considered, the denial at least neutralizes the assertion.

On this point my conclusion is, that the weight of the evidence is, that the three Foster notes in question were existing obligations between the parties at the date of the transfer; and that whether this be so or not, the purchase was made in good faith, and for a valuable and even adequate consideration.

As to the purchase of the brick block by William Crawford, it is practically admitted that on July 20, 1867, William Crawford sold the mill in question to James H. and John Foster for \$16,000—\$6,000 paid in cash and \$10,000 by the five joint notes of the purchasers for \$2,000 each, payable in one, two three, four, and five years, respectively, with interest at ten per centum per annum, secured by a mortgage on the premises. The notes are in evidence, and each of them bears indorsements of payments of interest thereon, as follows: July 20, 1869, \$400; July 20, 1875, \$1,200; and April 15, 1881, \$478.75.

All the business of William Crawford with Foster appears to have been transacted by John A. Crawford as his agent.

Crawford and Foster testify that about July 20, 1883, these five notes were unpaid except as shown by the indorsements thereon, when they were by consent of parties exchanged for six notes signed by James H. Foster as J. H. Foster & Co.—five of them being for \$2,000 each, payable in one, two, three, four, and five years from date, with interest at eight per centum per annum, and the sixth one for \$6,000, the amount of the overdue interest on the first five notes, payable in one year from date, without interest. These notes are also in evidence, and it appears from the testimony of Crawford that the exchange was made later than July 20th, and the notes were antedated, so as to make the old ones expire with the even year. They also testify that at the date of the transfer the second series of notes were due and altogether unpaid, and were given up to Foster in consideration of the conveyance to William Crawford of the brick block in question. William Crawford also testifies to the same effect, so far as he knows. He says the first series of notes were unpaid when his brother John got them from him for the purpose of making the exchange, and that the second series were unpaid when, at his brother's suggestion, he gave them to him for the purpose of purchasing the property then conveyed to him by Foster.

This is an improbable statement in all its essential features, though it may be true. Men do not usually allow debts of this character to run on for years without payment of the principal and comparatively little interest. The principal reason for

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changing the notes, that the legal rate of interest had in the mean time (Oct. 25, 1880) been reduced to eight per centum, is not satisfactory or convincing. Notwithstanding the change in the law, parties might still contract for ten per centum, and contracts made before the change were not affected by it. (Comp. 1887, secs. 3587, 3592.) The exchange was not made until nearly three years after the change in the law, which did not affect the notes in any way, and could not reasonably have been the cause of the exchange. But if the creditor thought eight per centum was as much as the debtor ought to pay under the circumstances, there was nothing to prevent reducing it either by new notes or a memorandum on the old ones without any reference to the change in the law or what the law might allow him.

On September 17, 1881, William Crawford made oath before the assessor of Linn County in writing that the notes owned by him, and liable to taxation in the state, amounted in value to only \$5,000. John A. Crawford makes the same explanation of this matter that he did concerning the omission to return his own Foster notes for taxation; that Foster was not to deduct the value of them from his assessment. But Foster says he did not make the deduction because Crawford did not charge him interest on the interest in arrear.

After the mortgage tax law of 1882 went into effect, in July, 1883, Mr. C. H. Stewart, the county clerk of Linn County, in looking over the record of mortgages for the purpose of making an abstract thereof for the assessor, found a mortgage of many years' standing from Foster to William Crawford on the mill property in question, given to secure the payment of a sum which then amounted, principal and interest, to about \$25,000. He naturally supposed from the circumstances that it had been satisfied, and at once wrote to Mr. William Crawford to call and make the proper credits or cancellation, or it would be returned to the assessor as in force. Mr. Crawford called immediately—on July 31st—and said the mortgage had been paid several years before, and that he had no knowledge of it being on the books of record, and then and there canceled it.

Mr. Stewart also testified that a few days before the convey-

ances in question were filed with him for record, John A. Crawford was in his office and spoke of the transfer of Foster's property, and said he was compelled to take it to protect himself; that he had indorsed largely for Foster and thought the notes were paid, but they had lately "turned up" in Portland, and that the purchase notes for the mill had been sold and indorsed away by him long before, and he thought they were paid, but now they had "turned up" also, in Portland, unpaid.

I attach much importance to the testimony of this witness. His official position implies public confidence in his integrity. He speaks cautiously, and a rigid cross-examination only served to confirm and strengthen his opening statement. He cannot well be mistaken about the interview with William Crawford, nor the cause nor consequence of it. They affected his official duties, and the record of the cancellation corresponds with his statement. The conversation with John A. Crawford was on a subject that was then attracting the attention of that public, and was calculated to make an impression on him. Moreover, the witness, unlike some of those who testify to other alleged conversations in this case, has no grievance against Foster or the Crawfords, but is disinterested and apparently unprejudiced.

True, it now appears that these mill notes were not indorsed to any one; and if they had been, Crawford would have had no right to cancel the mortgage. But this false statement as to the cause and consideration of the transfer of this block is, at least, a badge of fraud. (Bump, F. C. 42.) William Crawford's action in canceling the mortgage, with the declaration that it had been paid several years before, tells a different story.

John Conner, a banker of Albany, testifies that between 1878 and 1880, he thinks in 1879, Foster was owing him \$20,000 of borrowed money, when his cashier informed him that this Foster mortgage was on record uncanceled, whereupon he spoke to Foster on the subject, who replied "it had been paid and settled."

It may be admitted that this declaration of Foster's is not competent evidence in chief against William Crawford, to prove the payment of these notes. But Foster is introduced as a witness by Crawford, to prove that the notes were not paid at the time of the transfer, and the plaintiff has a right to impeach

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him by evidence of contradictory statements made out of court. Mr. Conner is a disinterested witness, and no one questions that Foster made this statement to him. The effect of his testimony is to make Foster's now statement, that the notes were unpaid, of no effect. This leaves the fact of their non-payment at the time of the transfer to rest on the testimony of the Crawfords, which is also materially affected by their declarations and acts to the contrary out of court.

In addition to the evidence of these disinterested witnesses, the unpaid creditors and others interested against the Crawfords testify to various conversations with John A., which strongly imply, when they do not assert, that the mill notes were paid before the transfer.

Thomas I. Anderson testifies that thirteen or fourteen months before the transfer he asked John A. Crawford if he had anything to do with the mill, when he answered, "Oh, that is all settled. I have nothing more to do with the mill than you have."

It is true that John A. had then nothing to do with the mill in his own right, nor, so far as appears, ever had. But he always speaks in the first person when speaking for his brother William, or of his affairs. And what he meant to say was "all settled," concerning this mill, unless it was William's mortgage thereon, is past finding out.

Thomas Monteith testifies that in the latter part of 1883 he had a conversation with John A., in which the latter said that Foster seemed to be getting along well. When he said, "Why don't he pay off the mortgage that has been on record then ever since he bought the mill?" when John A. replied, "Why, that mortgage was paid off long ago."

There never was but one mortgage between Foster and the Crawfords, and that was the one to William on the mill, and unless these witnesses are false or mistaken John A. said to them, in effect if not in words, these mill notes are paid off.

In answer to the testimony of all these witnesses concerning these statements of his, John A. Crawford, when called as a witness for himself, can only say, "I do not remember."

Another circumstance of which there is no doubt is entitled to some weight in this connection.

Between the giving of the mill notes in 1867 and the transfer in 1884, Foster expended \$40,000 on the mill property in repairs and improvements. He also built the brick block in question, which cost him probably not less than \$12,000, his dwelling-house, and his share of the water works. To my mind it is quite improbable that a person with this amount of money at his disposal would allow a mortgage, to secure a debt of \$10,000, to remain on his mill for seventeen years. And it is equally improbable that William Crawford or his other self, John A. Crawford, would allow the unpaid interest on such debt to accumulate to \$6,000, and then take a note for the amount without interest or security. Being unable to deny the cancellation of the mortgage as stated by Stewart, the Crawfords offer in their testimony this explanation, it was done to avoid the operation of the mortgage tax law of 1882. In other words, they swear that rather than pay the taxes on the mortgage, they released security for the debt, and this, notwithstanding the law of 1854, gave the mortgagee the right to pay the taxes on the whole interest in the land, and add the same to the mortgage, if not paid by Foster. (*Dundee do. Co. v. School District*, 10 Sawy. 61.)

On the whole, my conclusion is that the mill notes were paid before the conveyance to William Crawford was made, and therefore it is voluntary—without consideration. And this being so, it is fraudulent as against the plaintiffs and others, the creditors of Foster, the grantor therein. The decided weight of evidence supports this conclusion.

And yet it may be that these notes were existing obligations between the parties thereto on February 6, 1884, and that all the acts and declarations of the Crawfords to the contrary are falsehoods and pretenses, spoken and acted for the selfish purpose of avoiding the payment of the taxes thereon; but if so they have been ensnared in their own net, and cannot complain that the court has taken them at their own word.

Some question is made by counsel for the Crawfords as to the right of the plaintiff to maintain this suit. The testimony is satisfactory, indeed there is no room for doubt about it, that Sibson, Quackenbush & Co. and Noon & Co. sold and assigned their

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respective judgments to the plaintiff absolutely and for a valuable consideration, \$5,000 in the first case, and \$500 in the second, through the agent of the plaintiff's attorney in fact, William S. Ladd. And if Ladd and Tilton advanced him the money wherewith to make the purchase, as suggested in the argument, of which there is no proof, it would make no difference. The only question to be considered is, did the judgment creditors sell and assign the judgments in question absolutely, without any trust or reservation in their own favor. In other words, was the sale a real, and not a fictitious one? As I have said, the evidence is satisfactory on this point. The sale was absolute and unqualified. This being so, it is altogether immaterial that the judgment creditors may have been induced to make this sale as they did, because they feared they could not succeed in enforcing the judgments in the state court—the tribunal of the defendants—or that the plaintiff made the purchase, because, being a citizen of Illinois, he thought he could enforce the same against the property of the judgment debtor, in the hands of the Crawfords, by a suit in this court—the interstate tribunal—and that he intended to do so when he bought them.

The motive with which a party purchases property or a claim has nothing to do with his right to maintain an action thereon or thereabout in this court any more than in a state court. (*McDonald v. Smalley*, 1 Peters, 623; *Barry v. Baltimore City*, 6 Wall. 288; *Collinson v. Jackson*, 8 Sawy. 363.) The conveyances to John A. Crawford and Ashby Pearce being valid as against the plaintiff, the bill will be dismissed as to them, with costs.

The conveyance to William Crawford, being void as against creditors, will be declared fraudulent and set aside, and the property sold by the master, and the proceeds applied, first, on the judgments of the plaintiff and his costs and disbursements in this suit, and the remainder, if any, *pro rata* on the judgments and costs and disbursements in this suit of Walden, Baltimore and Liles. The decree will also provide that if the proceeds of the sale are not sufficient to pay the judgments of the plaintiff, and his costs and disbursements, that execution may issue against the property of William Crawford for the remainder.

The judgments of the plaintiff are prior in time to those of Baltimore and Liles, but subsequent to that of Walden. Neither of the judgments, however, are liens on the property in question, the title of the judgment debtor thereto having passed to William Crawford before the judgments were given or docketed. There was no interest of Foster's left in the property for the judgments to operate on. The conveyance was valid between the parties thereto. The right of the creditors to have it set aside for fraud as to them was all that was left. The plaintiff being the first creditor to assert this right, by the filing of his bill, then acquired a prior right to whatever may be made out of the property of the suit. (*Burt v. Keyes*, 1 Flipp. 72; Wait, F. C. sec. 392; *In re Estes*, 6 Sawy. 459, and cases there cited.)

In the latter case, after a careful examination of the subject, I held that under the law of this state the lien of a judgment only attached to property belonging to the judgment debtor at the date of its docketing, and that a conveyance, though void as to creditors who might assert their right against it, was valid between the parties, and passed all the estate of the grantor in the premises to the grantee, and therefore the lien of a subsequent judgment does not attach to the property.

THE OREGON AND WASHINGTON M. S. BANK v. THE
AMERICAN MORTGAGE COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 7, 1888.

1. AGENCY WITH INTEREST—REVOCATION OF.—An agency or authority, coupled with an interest in the subject-matter thereof, may be revoked by the principal in pursuance of a stipulation or reservation to that effect in the instrument constituting the agency or authority.
2. *IDEM*—NOT COUPLED WITH AN INTEREST.—An agency to loan the principal's money in his name and collect the interest thereon, in consideration of an annual commission on the existing amount of such loans, to be retained by the agent out of the annual interest thereon when collected by him, is not an agency coupled with an interest in the subject-matter thereof, and may be revoked by the principal at his pleasure.
3. SUBMISSION TO ARBITRATION—REVOCATION OF.—A submission to arbitration, where the same is not made a rule of court, or otherwise regulated by statute, may be revoked by either party thereto, at any time before an award is made, and the remedy of the adverse party, if he is damaged thereby, is by an action on the agreement to submit.

Before DEADY, District Judge.

Mr. Albert H. Tanner, for the plaintiff.

Mr. John M. Gearin, for the defendant.

DEADY, J. This action is brought by the plaintiff, a corporation formed under the laws of Oregon, against the defendant, a corporation formed under the laws of Great Britain.

There are three causes of action stated in the complaint, to each of which the defendant demurs, because the facts stated do not constitute a cause of action.

In support of the first claim it is alleged that on October 10, 1882, the parties made an agreement by which the plaintiff undertook to act as the sole agent of the defendant in the business of loaning money in Oregon, Idaho, and Washington, "upon an actual commission or remuneration to be received from and upon the interests actually collected from loans;" that the plaintiff, as such agent, was to keep the defendant "harmless" from all claims for taxes levied on such loans, for which it was to receive one per centum yearly on the existing amount thereof; and also to bear all the expense of making such loans and enforcing the payment thereof if necessary, for which it was to receive one and a half per centum yearly on the existing amount thereof, to be deducted in each case "from the interests it may collect thereon;" that "if the mortgage company (the defendant) should desire at any time to cease loaning in Oregon, Idaho, and Washington through the agency of the said bank (the plaintiff), or if the latter should desire to resign the agency of the mortgage company, each shall be entitled and bound to give the other three months' notice of said proposed termination, so that loans intended to be made for the mortgage company in the future shall be directed and applied by the bank elsewhere," and that in pursuance of such provision the agency was terminated on September 15, 1887; that the plaintiff entered on the business of such agency and continued in the same until such termination, and during said period made "numerous" loans, a large number of which were then outstanding, which the plaintiff was entitled to and offered to collect as they became due, and

“was and is entitled to receive commissions on such loans until the same are paid off,” on which account there is now due the plaintiff the sum of \$25,713.72.

The second cause of action consists of a claim for \$779.29, laid out and expended by the plaintiff in the business of such agency for the use and benefit of the defendant; and the third one consists of a claim for \$20,000 damages alleged to have been sustained by the plaintiff, by reason of the defendant's revocation of a submission of the matters in dispute under said agreement to arbitration.

On the argument of the demurrer, it was admitted that it was not well taken, as to the third cause of action.

Either party may revoke a submission to arbitration at any time before an award, where the submission is not made a rule of court or otherwise regulated by statute. And the remedy of the other party is an action on the agreement to submit, to recover the damages, if any, caused by such revocation. (*Allen v. Watson*, 16 Johns. 205; *Jones v. Harris*, 59 Miss. 214.)

Of the gross amount of damages claimed on this account, only \$1,529 is itemized in the bill of particulars filed with the complaint, \$1,000 of which is for “attorney fees.” But however improbable it may be that this amount of damage, or any considerable portion thereof, could have been caused by this revocation, the defense to the claim must be made by answer and not demurrer.

The second cause of action, as shown by the bill of particulars, consists of sundry items of expense incurred by the plaintiff in making and enforcing the payment of loans, and the payment of taxes thereon as provided in the agreement, except two, amounting to \$38.56, for taxes paid on land. Under the agreement, the plaintiff, in consideration of the commission it received, was bound for all these expenses, except those incurred in the payment of taxes on land. The demurrer to this cause of action is sustained, except as to these two items of taxes.

The first cause, as I apprehend it, consists of sundry items of annual commissions on loans which the plaintiff made prior to the termination of its agency, on September 15, 1887, and which it alleges it would be entitled to retain and receive out of the

collections of interest due and to become due thereon until they were fully paid and discharged.

The demurrer to this cause of action assumes that by the terms of the contract between the parties, when the agency is terminated by either of them, it is terminated *in toto*, and that the plaintiff's right to collect the loans of the defendant, and have or retain a commission therefor, is then at an end. The plaintiff, however, contends that the termination of the agency under the contract only applies to future business or loans, and that as to loans then made and outstanding the plaintiff is entitled to the management and control of the same, and to receive and have compensation therefor, as though the notice to terminate had not been given.

It is not alleged in the complaint which party to the contract gave the notice to terminate the agency. It was admitted on the argument, however, that it was done by the defendant. But the omission is not material, as the subsequent relation of the parties and that of the plaintiff to the loans then made and outstanding would be the same in either case. Neither is it alleged that the defendant has refused to allow the plaintiff to collect the interest on these loans and retain the commission for its services, but on the argument the refusal was taken for granted, and for the purpose of the demurrer will be so considered.

The provision of the agreement concerning the limitation of the agency, leaving out the added clause, commencing "so that the loans," is neither obscure nor ambiguous. The object of this clause seems to be to state the reason for requiring notice of the termination of the agency. But it is not apparent how it qualifies the language or effect of the provision for notice. If it has any meaning or purpose, which counsel would not undertake to say, it may be this—the plaintiff will thereby have time to look "elsewhere" for money with which to make loans, it may be negotiating when the notice is received. Still, the use of the words "directed" and "applied," in that connection, are very vague and purposeless, and it is not at all certain what the writer of the clause had in his mind, or that the parties to the instrument had, when they executed it, any idea of its significance or purpose.

There being no provision in the contract for the continuance of the agency for any prescribed period, it might, but for the provision concerning notice, have been terminated at the pleasure of either party. As a restraint on this right, and to prevent the inconvenience that might follow from a sudden rupture of the relation between the parties, the clause requiring notice was inserted. If, notwithstanding the termination of the agency, there is still left to the plaintiff an interest in or control over the business of the then outstanding loans, it is not recognized or provided for, where it would most naturally be found—in the provision concerning the termination of the employment.

Neither is there anything in the nature or purpose of the contract, or in any of the other provisions therein, which gives support to the proposition, but the contrary. The agency was merely for the negotiation of specific loans, and the collection thereof when due, for which the agent was to receive a commission of one and a half per centum yearly on the whole amount then loaned and outstanding, and a further percentage of one per cent on such loans in consideration of saving the defendant from the payment of taxes on the same. When the agent had a proposition for a loan the same was forwarded to the principal in Scotland, when, if it was accepted by the latter, a sum equal thereto was placed to the credit of the agent on the books of the principal, for which the former then drew on the latter. All notes and mortgages received on loans were required to be immediately forwarded to the principal, where they were kept until returned, when due, for collection.

But it is claimed that the plaintiff, as to the outstanding loans negotiated by it, is an agent with an interest, and therefore the agency is so far unrevocable.

The general rule is that a principal may revoke the authority of his agent at his pleasure. To this there are some exceptions, one of which is, where the principal has expressly stipulated that the authority shall not be revoked, and the agent has an interest in its execution. But both these circumstances must concur; for if the agent has no interest in its execution it may be revoked, although it contains a stipulation to the contrary. (Story on Agency, secs. 462, 476.)

And where an authority or power "is coupled with an interest," or is given for a valuable consideration, or is part of a security from its nature and character, in contemplation of law, it is irrevocable, unless there is an express stipulation to the contrary. (Story on Agency, sec. 447. And see *Hunt v. Rousmanier*, 8 Wheat. 203.)

There was no consideration paid for this agency, nor was it given or intended as a security to the plaintiff for any purpose. Neither is it an authority, "coupled with an interest." The title to or property in the money loaned was not, by the terms of the agency, vested in the plaintiff, but remained in the defendant. To constitute a case of an agency or power, "coupled with an interest," the property in the thing which is the subject of the agency or power must be vested in the person to whom the agency or power is given, so that he may deal with it in his own name. (*Hunt v. Rousmanier*, 8 Wheat. 203.)

The plaintiff was simply employed to loan the money of the defendant and to collect the same with the interest thereon, as it became due, for a compensation proportioned to the amount of the business done. It has no interest in the loans or the gains arising therefrom, except the amount it was entitled to retain out of the latter when collected, and not before, in payment of its services. But were this otherwise, and even admitting that the agency of the plaintiff was coupled with an interest in the outstanding loans, so far as the right to collect the interest accruing thereon is concerned, yet the agreement between the parties expressly provides that the agency shall be revocable by the defendant on ninety days' notice to the plaintiff. With the giving of this notice, the employment of the plaintiff terminated; and although it may thereby have lost a lucrative business, in the contemplation of law, it has not been deprived of anything that belonged to it or in which it had any property interest, and therefore has no right to complain.

The demurrer to this cause of action is sustained.

Points decided.

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UNITED STATES v. HINZ ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MAY 21, 1888.

1. **CRIMINAL LAW—ACCOMPLICES—TURNING STATE'S EVIDENCE—RIGHT TO IMMUNITY—FORFEITURE BY BAD FAITH.**—Hinz, accused as an accomplice in crime, upon a promise of immunity if he would testify truly before the grand and trial juries, and thereby aid in the indictment and conviction of his co-conspirators, testified fully before the grand jury, and upon his testimony a joint indictment was found against his associates in crime and himself. After a trial jury had been impaneled to try three of the parties, to whom a separate trial had been granted, Hinz informed the prosecuting attorney of his determination to so change his testimony as to wholly exonerate the parties on trial, and thereby render it impossible to convict them upon testimony then available; and, upon being threatened with a prosecution for perjury if his testimony should be so changed, he refused to testify at all, and the prosecuting attorney was then constrained to make, and did make, an arrangement with another accomplice to testify upon similar terms, who, having testified, was discharged, and a *not pros.* as to him entered. Hinz was thereupon arrested, and held to answer to the indictment. After the other testimony of the prosecution and of the defense was all in, Hinz offered, and was anxious, to testify in rebuttal, but his offer was declined. *Held*, that Hinz, by refusing to testify before the trial jury, as he had agreed to do, notwithstanding his testifying before the grand jury, had forfeited all right to immunity or clemency, and subjected himself to trial and conviction, and the court refused to continue the case in order to allow him an opportunity to apply to the President for a pardon before conviction.
2. **SAME—DISCRETION OF COURT.**—Whether an accomplice already indicted shall, upon promise of immunity, be admitted as a witness for the government or not, is determined by the judges in their discretion, as may best serve the purposes of justice.
3. **SAME.**—If the accomplice offering himself as a witness, with the expectation of immunity, appears to have been the principal offender, he should be rejected.
4. **SAME—CONFESSIONS.**—If an accomplice, having made a private confession upon a promise of pardon by the attorney-general, should afterwards refuse to testify, or in bad faith testify falsely, he may be convicted upon the evidence of that confession.
5. **SAME—ACCOMPLICE TESTIMONY—CORROBORATION.**—The court will advise a jury not to convict of felony upon the testimony of an accomplice alone, without corroboration.
6. **SAME.**—If two or more accomplices are produced as witnesses they are not deemed to corroborate each other; but the same rule applies, and the same corroboration is required as if there were but one.
7. **SAME—PARDON—CONTINUANCE.**—Although the prosecuting attorney has no authority to contract that a person convicted of crime shall not be prosecuted, if, when examined as a witness against his accomplices, he declares, fully and fairly, his and their guilt, yet when he does so under promise of immunity, and his evidence is accepted by the court, he is equitably entitled to immunity, and a recommendation for pardon; and should the prosecuting attorney not enter a *nolle prosequi*, but insist upon a trial, the court will continue the case in order to allow time for the accused to apply to the President for a pardon.

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Opinion of the Court—Sawyer, C. J.

Before SAWYER, Circuit Judge, and HOFFMAN and SABIN,
District Judges.

On motion to continue case.

Indictment for conspiracy to land Chinese on forged certificates.

Mr. H. C. Dibble, for motion.

Mr J. T. Carey, United States Attorney, *contra*.

By the Court, SAWYER, Circuit Judge. In October, 1885, the district judge called the attention of the grand jury then impaneled to the supposed conspiracy charged in this indictment, and directed that body to investigate the matter. After full investigation upon the evidence then at the command of the government, the grand jury were unable to find an indictment, and the bill was ignored. Afterwards, a fortuitous concurrence of circumstances brought the defendant, Hinz, into communication with Mr. Scott, a deputy collector, who introduced him to Mr. McPike, the assistant United States attorney. In the conference had, the assistant United States attorney promised Hinz that, if he would disclose all the facts in regard to the conspiracy, and testify to the whole truth fairly before the grand and petit juries, he should not be prosecuted. This proposition having been accepted by Hinz, he was taken before the grand jury at that time in session, by the United States attorney, where he testified fully in regard to the matter, the result of which, was, the finding of the present bill, charging F. D. Ciprico, William A. Boyd, E. W. McLean, W. W. Whaley, and the party now before the court, A. Hinz, himself, with the conspiracy in question. Hinz and Deputy Collector Scott were the only witnesses examined before the grand jury. It was very clear from the evidence developed on the trial of Ciprico, McLean, and Whaley, that Scott could not have testified as to many of the principal and essential facts, and that the indictment could not have been properly found upon any evidence then in possession of the government without the testimony of Hinz. All the parties charged, except Hinz, were arrested, and

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all arrested were discharged on bail except Boyd, who, being unable to procure bail, was committed to prison, where he remained until the trial of Ciprico and McLean. All the parties arrested having pleaded not guilty, on motion of Ciprico, McLean, and Whaley, with the consent of the United States assistant attorney, who tried the case, a separate trial was granted to them, leaving Boyd to be tried alone. The United States attorney determined to try Ciprico, Whaley, and McLean first, doubtless believing that he could make a stronger case against them than against Boyd, for Mrs. Boyd was a vitally important witness against those defendants, and she would be an incompetent witness against her husband; and in this case, had Boyd been on trial at the same time, her testimony would have been inadmissible. A conviction of Ciprico, also, might open the way to the more certain conviction of Boyd. The fact that Mrs. Boyd would be an incompetent witness in case of a joint trial, may also account for the readiness of the attorney of the United States to consent to a separate trial. However this may have been, a separate trial was granted, and it was determined to try Ciprico, Whaley, and McLean first, and the trial was set for Tuesday, March 27th. On the morning of that day, a jury was impaneled by Assistant Attorney Weller, Mr. McPike, who was to try the case, being engaged in the trial of another case in the district court; and after the jury was impaneled, the trial was adjourned over till Thursday, March 29th. What then occurred to affect the action of the prosecuting attorney we will state in his own language, taken from his letter to the attorney-general, read on behalf of Hinz on this motion, suggesting a pardon, which we have no doubt is literally and strictly true, as it corresponds exactly with the account given to the court at the time, for the purpose of explaining his sudden change in the course of the proceedings. He says:—

“On the day that the jury was impaneled, I met Mr. Hinz; told him that I had no time to go over his testimony again with him; and asked that he furnish me with a written statement of what he proposed to testify to before the trial jury, which he did. Upon examination, I found that the government could not depend upon Mr. Hinz as a witness against Ciprico and

McLean, they having procured separate trials from defendant Boyd. This written statement of Mr. Hinz being so much at variance with his testimony before the grand jury, my suspicions were immediately aroused, and I saw at once that if I were to depend upon him, Ciprico and McLean would be acquitted beyond all question; that defendant Boyd, from this circumstance, would gather hope, and in all probability, the case against him would also fail, and the government suffer the humiliation of not being able to prove the existence of the conspiracy, or punish the guilty parties. I firmly believed at the time that Mr. Hinz had been induced by corrupt means to change his testimony, and thereby defeat the government, for his was the only testimony upon which I could depend to give a history of the conspiracy—the rest of the evidence being only in corroboration. Accordingly, on the evening before the trial began, I visited the jail where defendant Boyd was, and induced him to turn state's evidence, promising him exemption from punishment, if he would do so. He came into the court-room the next morning, and was the first witness on the stand. I then introduced what corroborative testimony I had at hand, and rested the case."

Mr. McPike, further on in his statement, says:—

"It must be admitted that his conduct in offering to change his testimony can receive no extenuation," and "it is true that by his acts he compelled me to have recourse to Boyd, but this fact did not add to his guilt as a conspirator."

And in connection with these remarks he submits some considerations for the exercise of clemency, notwithstanding these facts.

In his affidavit in opposition to the present motion, after stating the testimony given by Hinz before the grand jury, and the testimony which he proposed to give at the trial, Mr. McPike, among other things, says:—

"Affiant had three conversations with said Hinz relative to what his testimony would be upon the trial of said cause—one in affiant's private office in the presence of H. H. Scott; one in affiant's room, in the office of the United States attorney's office; and one in the court-room. The last two named were after the

jury had been impaneled for the trial of said cause. In each of these interviews affiant used all honorable efforts possible to induce said Hinz to state the facts as he had detailed them before the grand jury, but which said Hinz declined to do, and steadfastly persisted in changing his testimony so as to defeat the prosecution. Affiant being put to straits, then summoned the grand jurors, or some of them, for the purpose of being prepared to establish the statements made by said Hinz, before that body, and informed said Hinz that, if he insisted upon testifying as threatened by him, he would have him arrested for perjury. Hinz, after being informed by affiant of his purpose to arrest him for perjury if he should falsify his statement made before the grand jury, refused to testify in the cause at all. In each and all of said conversations said Hinz refused to testify as he had theretofore done before said grand jury, but insisted that he would testify as stated in said written memorandum, which said statement wholly exonerated the defendant Ciprico from all participation in said conspiracy and charges contained in said indictment. Under these circumstances it was that affiant offered inducements to the defendant, W. A. Boyd, and procured him to turn state's evidence. After said Boyd had taken the witness stand, and had testified, and the prosecution had closed the case for the government, said Hinz came to affiant, and offered to testify as he had before the grand jury, and disclosed to affiant that he, Hinz, had had interviews with defendant Ciprico, and that, by certain statements made to him, he had been induced to change his testimony."

Confirmatory of the foregoing statement of Mr. McPike, Deputy Collector Scott, in his affidavit read on behalf of Hinz, says:—

"A short time before the case came on for trial against Ciprico and McLean, Mr. Hinz came to see affiant, at the custom-house, and told affiant that it was possible that he had made a mistake in his testimony before the grand jury, as to his having seen McLean at Mr. Boyd's house. There was some conversation on this matter between affiant and Mr. Hinz, and he then left. Affiant did not see Mr. Hinz again till the night before the case was to come on for trial. There was then some

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conversation between affiant, Hinz, and McPike, from which affiant concluded that Hinz would not testify as he had done before the grand jury. McPike and affiant then thought it would not be safe to put Mr. Hinz on the stand as a government witness. Affiant further says that next morning in court he met Mr. Hinz with McPike, and from the conversation then had, affiant understood that Mr. Hinz would not testify on the trial as he had testified before the grand jury."

And in his affidavit read in opposition to the motion, Scott further states, as follows:—

"Affiant further deposes and says, that just before the trial of Ciprico was coming on to be heard, affiant was present at an interview had between said Hinz and said McPike; that in said interview said Hinz stated the changes he proposed to make in his testimony, and it was wholly at variance with what he had theretofore stated the facts to be, and with what he testified to before the United States grand jury, which had found the indictment in said case; that the changes made in his testimony were, in substance, that he did not see McLean at Boyd's house on the evening of the 8th or 9th of January, 1885; that Ciprico was present the evening of the 8th or 9th of January, 1885, at Boyd's house, but that he called there on business relative to an incoming or outgoing ship or vessel; that it was the third party present that evening who mentioned the Chinese certificates, but Ciprico did not; that it was this third party who the next morning went on board of the City of Peking, as said Hinz was about to depart for China, and made the remark, 'The damned rascal has only give you one hundred instead of five hundred certificates.' His changed testimony, in substance, was such that Ciprico was in no way connected with the conspiracy charged, nor with the delivery, or knowledge of the delivery, of the certificates to Hinz. Affiant further deposes, and says that, at no time prior to the trial of Ciprico, did said Hinz inform this affiant that Ciprico had desired him to modify or change his testimony, nor of any efforts that had been made to have him change his testimony, nor of any interviews or meetings he had had with Ciprico and others for the purpose; but, on the contrary, affiant says that Hinz, when accused of having

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meetings with Ciprico, denied that he had seen him, except upon one occasion he had met him on the street; that affiant did not know that Hinz was considering the matter of changing his testimony, as far as Ciprico was concerned, until the day the jury was impaneled in the trial of the cause of the United States against Ciprico."

On the trial of Ciprico and McLean, on the cross-examination, in answer to numerous questions by the prosecuting attorney upon matters not called out in the examination in chief, and, consequently, it was the testimony of the prosecution, Ciprico fully corroborates the idea that, in several interviews, Hinz had admitted that he had done Ciprico injustice before the grand jury, and indicated a determination to correct his errors at the trial. This testimony was given on the trial, before the statements of Mr. McPike and Scott, before quoted, were made, and when Ciprico, who was himself taken by surprise at the turn of affairs, could not have known the nature of the information upon which the prosecuting attorney changed his course of proceedings from that anticipated. So, also, Hinz's own statement embodied in Mr. McPike's communication to the attorney-general, made after Boyd's testimony and his own arrest, when he was extremely anxious to present himself in a most favorable aspect—after he had changed his prior written statement—corroborates the views taken of his action by McPike and Scott, as it shows that he had several interviews with Ciprico and his attorneys, and discussed this whole subject, and agreed at least to change his testimony as to McLean, and was manifestly understood by Ciprico to agree to change it as to Ciprico also.

Upon a full consideration of the case as presented, we cannot doubt that Mr. McPike and Scott had ample grounds to take the view they did, when they dropped Hinz and sought to arrange with Boyd. We are satisfied, now, that they were not then mistaken, and that Hinz had determined to change his testimony in such manner as to exonerate Ciprico, as well as McLean, and that their action was based upon a well-grounded belief that Hinz would prove false and faithless. That Hinz connected Ciprico with the conspiracy in his testimony before the grand jury, necessarily appears, or the indictment could not have been

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found. At the close of Boyd's testimony implicating Hinz, Mr. McPike, believing that Hinz intended to break faith with him, and had, by his conduct, forfeited all just claims to further immunity from punishment, asked that Hinz be taken into custody under the indictment, and held to bail to appear for trial; and the court, believing it proper, under the circumstances, made the order, which was executed, and he was held to bail in the sum of five thousand dollars. Boyd having fully testified, as he had agreed to do, the prosecuting attorney, in accordance with his promise, immediately entered a *nolle* as to him, and he was discharged from custody. The court having, on the resting of the prosecution, adjourned over for several days to the next week, it is evident that Hinz began, in the mean time, to realize the critical position in which he found himself. He was now liable to be convicted himself on the testimony of Boyd, with other corroborating testimony, and perhaps his own testimony before the grand jury, in case he should not be accepted as a witness, or if he should be accepted, and testified differently from his testimony before the grand jury, he was liable to be indicted and convicted for perjury. Manifestly, realizing the situation, he at once set about retracing his steps. He sought to appease and reassure the prosecuting attorney, and became anxious to carry out his original arrangement, and go upon the stand. When his proposition was rejected, just before the close of the rebutting testimony, he became so urgent as to waive all right to immunity, and testify without conditions. But even this would have given him an equity, and the district attorney himself interfered; and objected to his going upon the stand, under the circumstances, at this stage of the case, when his testimony, under the rules of law, could add no force to that of his co-conspirator, Boyd. The court concurred with the district attorney, and he was not examined. With a view to applying the law to the case, the following additional facts should be stated: The testimony of Boyd, on the trial of Ciprico and McLean, if it is to be believed—and there is nothing to the contrary—shows that Boyd and Hinz are the original and principal conspirators—the originators of the whole scheme, and the principal actors in carrying it out. Boyd was in the col-

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lector's office, having the facilities for obtaining, and he did obtain the fraudulent certificates in all respects genuine in form, execution, and appearance. He furnished them to Hinz, who carried them in person to China, or received them through the mails or other channels, and sold them, or caused them to be sold. Boyd testifies that Hinz had been to China, and engaged in this business, at least once before the voyage on the 10th of January, 1885, now in question; that they two, without the aid of Ciprico and McLean, had successfully carried on this nefarious business from ten months to a year or so before Ciprico and McLean were let into the arrangement, or had anything to do with it, and that Hinz was the first to suggest the scheme to Boyd; that Ciprico connected himself with the conspiracy not more than two or three weeks before the alleged meeting at Boyd's house on the evening of the ninth day of January, 1885, and was first introduced by him (Boyd) to Hinz at the saloon on Post Street about a week before the meeting at his house. Thus, if his testimony be true, Boyd and Hinz are the originators of the conspiracy, and the principals in it—the conspirators who performed the leading and principal parts—while Ciprico and McLean, if they participated at all, came in late, and performed the subordinate, though highly important and criminal, part of knowingly landing Chinese upon certificates in all respects duly executed and sealed, and in all particulars, apparently, genuine, furnished and sold to the Chinese by Boyd and Hinz. While this fact does not mitigate the offense committed by Ciprico and McLean, if they conspired with the others in the way alleged, and should not prevent a conviction, if sufficient legal and proper evidence can be produced of their guilt, it does have some bearing upon the rules of law applicable to the evidence of accomplices, and to the motion for continuance now before the court. At the opening of the trial, a *nolle* was entered as to Whaley, the prosecuting attorney having no evidence to present against him, and none afterwards connected him with the matter. But very slight corroborative evidence was presented against McLean, he and Ciprico having testified on their own behalf, and positively denied all connection with the conspiracy, and the jury could not properly do otherwise than acquit him,

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as they did. Boyd was discharged upon testifying, as a last resort, at the earnest solicitation of Mr. McPike, when he had abandoned all hope of getting honest evidence from Hinz.

And it only remains now to again try Ciprico, who, if guilty, played a subordinate though highly important part; and to determine whether Hinz, the only remaining principal conspirator, shall go free after having, by his vacillating course, secured the discharge of the other originator of and leading principal in the conspiracy. The latter question must depend upon the law applicable to the foregoing state of facts. Says Mr. Greenleaf, in his work on Evidence, which has been a recognized standard authority on that subject in the courts for more than half a century:—

“It is a settled rule of evidence, that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted, and sentenced for an infamous crime. The admission of accomplices as witnesses for the government is justified by the necessity of the case, it being impossible to bring the principal offenders to justice without them.”

After stating the usual proceedings in such cases, he proceeds:—

“But whether an accomplice already charged with a crime by indictment shall be a witness for the government, or not, is determined by the judges in their discretion, as may best serve the purposes of justice. If he appears to have been the principal offender, he will be rejected. And if an accomplice, having made a private confession upon a promise of pardon made by the attorney-general, should refuse afterwards to testify, he may be convicted upon evidence of that confession.” (1 Greenleaf on Evidence, sec. 379.)

So, also, “judges in their discretion will advise a jury not to convict for felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the judges. And considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of prac-

tice not to convict a prisoner in any case of felony, upon the sole uncorroborated testimony of an accomplice." (1 Greenleaf on Evidence, sec. 380.). Under the Penal Code of California there is no advisory discretion in the judge, but a conviction on the uncorroborated testimony of an accomplice is absolutely prohibited. (Pen. Code, sec. 1111.) So, also, "if two or more accomplices are produced as witnesses, they are deemed not to corroborate each other; but the same rule is applied, and the same confirmation required, as if it were but one." (1 Greenleaf on Evidence, sec. 381.) So says the United States supreme court in the *Whiskey Cases*:—

"Offenders of this kind are not admitted to testify as of course, and sufficient authority exists for saying that, in the practice of the English courts, it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. Phil. Ev. 87; 3 Russ. Crimes (9th Am. ed.), 598." (99 U. S. 603.)

In the *Whiskey Cases* it was also held that "the district attorney has no authority to contract that a person accused of an offense against the United States shall not be prosecuted, if, when examined as a witness against his accomplices, he discloses fully and fairly his and their guilt." (99 U. S. 594.) In the same cases, after stating that the prosecuting officer will grant an interview to an accomplice, and the communication will be regarded as confidential, and that if he is subsequently called and examined, he will be entitled to a recommendation for executive clemency, the court adds: "Promise of pardon is never given in such interviews, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow." (99 U. S. 604.) The court further says: "Such offenders, if they make a full disclosure of all matters within their knowledge, in favor of the prosecution, will not be subject to punishment; but if they refuse to testify, or testify falsely, they are to be tried, and may be convicted upon their own confession." (99 U. S. 605.) Thus it will be seen, that the authority to promise immunity to an accomplice upon his turning state's evidence is not vested in the prosecuting officer, but whether

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they will be admitted to testify, and thus secure an equitable right to clemency, is vested in the discretion of the courts, to be exercised cautiously, in view of all the circumstances of the case, and to promote the ends of justice. If the testimony is offered, and the party testifies fully and frankly without objection by the court, it will, of course, be regarded as given with the sanction of the court, and he is equitably entitled to be exonerated from punishment. But in this case, although the defendant Hinz testified before the grand jury, yet before coming to the trial of Ciprico and McLean, he gave Deputy Collector Scott and the prosecuting attorney distinctly to understand, that his testimony would not be such as to implicate either Ciprico or McLean. And afterwards, when threatened with prosecution for perjury, in case he should testify falsely, he flatly refused to testify at all in the case. He might well, perhaps, have been doubtful about McLean, as it seems probable now, that he did not know him at the time; but as it seems to us there certainly could have been no possible ground for doubt as to Ciprico. That Hinz did not honestly change his mind as to the testimony he was about to give as to Ciprico, as is now claimed on his behalf, is apparent from the fact, that at last he offered, when too late, to again testify as he had done before the grand jury, and connect Ciprico with the conspiracy; that Scott and McPike firmly believed, and had ample grounds to believe, that Hinz would not testify against Ciprico, and that, without his testimony, there was no possibility of a conviction of either of the defendants on trial, there can be no possible ground for doubt. Only this extraordinary state of facts could possibly justify, or excuse the prosecuting attorney in the sudden and extraordinary change of the course of the prosecution. Boyd, together with Hinz, turns out in the evidence adduced on the trial to be not an accomplice merely, but the principal and the original prime conspirator. In all particulars he and Hinz were the actual chief conspirators, while Ciprico, if connected with them at all, is but a subsequent accomplice. The rule of law as I have announced it, if rigidly construed, would, perhaps, exclude the principals, Boyd and Hinz, entirely from testifying. Says the rule: "If he [the witness offered] appears to be the principal

offender, he will be rejected." (1 Greenleaf on Evidence, sec. 379; *United States v. Lee*, 4 McLean, 104; *People v. Whipple*, 9 Cowen, 707.)

The prosecuting attorney, after his arrangement, made at the last moment, with Boyd, offered him as a witness, and asked the court to permit him to testify in pursuance of the arrangement, and the court appreciating the dilemma in which he so unexpectedly found himself, and not knowing the relation of Boyd as principal offender, as was subsequently developed, reluctantly consented; and Boyd, having testified fully, was discharged. Had his exact relation to the conspiracy, as subsequently developed in the testimony, been known to the court at the time, it would have hesitated long before permitting him to obtain immunity by testifying against his subordinate, though criminal, accomplices. If Hinz had not indicated a purpose to change his testimony in such manner as to exonerate Ciprico and McLean, but had gone on the stand and testified fully and frankly, with the acquiescence of the court, he would have been entitled to immunity; and if the United States attorney had then declined to enter a *nolle*, the court would have continued the case in order to allow an opportunity to apply to the President for a pardon in advance of the trial; and would have even recommended a pardon. (*United States v. Lee*, 4 McLean, 103.) This principle is also recognized in the *Whiskey Cases* already cited. But the difficulty is he did not do it, but on the contrary, indicated his purpose to retract his testimony, and he thereby compelled the prosecuting attorney at the last moment to fall back upon the other chief conspirator, or fail in the prosecution. By so doing, notwithstanding the fact that the indictment was found upon his testimony, he did not stand up to his agreement, and by his course he compelled the prosecuting attorney to seek other evidence, and grant immunity to another principal conspirator. By this action, in our judgment, he forfeited all right, equitable or otherwise, to immunity, or to leniency. And so are the authorities. (*Whiskey Cases*, 99 U. S. 605; *Commonwealth v. Knapp*, 10 Pick. 477; 1 Greenleaf on Evidence, 379.) His action in the matter was, in our opinion, fully equivalent to an absolute refusal to go upon the stand and testify at all,

or having taken the stand, testified falsely in bad faith in favor of, instead of against, the defendants on trial. And he did in fact, finally refuse to testify at all, till too late. To exonerate Hinz now would be through his action to secure not only his own immunity, but also that of Boyd, the other original and principal conspirator, all the principals, and to turn their united efforts upon Ciprico. This would savor too much of a conspiracy encouraged by the government, of the two original and principal offenders—the concocters and most active executors of the nefarious schemes—to convict an accomplice, who, if *particeps criminis*, came later into the conspiracy, and played a secondary and subordinate, however important and criminal part, in carrying it out. Should Hinz go free there only remains Ciprico to be tried again, McLean having been acquitted, and the jury having disagreed as to Ciprico. It is true that Hinz at last offered in rebuttal to testify fully, and as he did before the grand jury, and to thus ultimately carry out his agreement; and so desirous of doing so was he that upon his rejection by the United States attorney, Carey, that he offered to go upon the stand without conditions. But this was too late. The mischief had been accomplished. The arrangement had been made with Boyd, who had performed his part, and had been exonerated; and Hinz, in the mean time, had been arrested, and held to answer the indictment. It was not till he found himself in this predicament, when he was likely to be tried and convicted on the testimony of Boyd and other corroborating evidence pointing to him that did not point towards Ciprico, and perhaps on his own previous testimony, that he became so anxious. At this time the prosecution had no possible use for him. His testimony at that stage of the case, after Boyd had testified, would have had no legal effect. It could not under the law of evidence have strengthened the case. As we have seen: “If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other, but the same rule is applied, and the same confirmation required as if there were but one.” (1 Greenleaf on Evidence, sec. 379.) Under this rule Hinz’s testimony would have been of no possible use. It was too late, and nothing could have been done affording an equitable consideration for immunity. So there will be no use

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for him on the trial if Ciprico should be tried again, as Boyd is still under obligation to testify in that case, in order to maintain the immunity that has been accorded to him. We see no good grounds for favor or reason for continuing the case in order that Hinz may apply to the President for a pardon in advance of conviction. To grant the motion for the purpose desired would doubtless be regarded as a tacit or implied recommendation by the court that the pardon be granted; a position in which we cannot conscientiously place ourselves. Besides, the prosecution now has the evidence at command, and should a pardon be granted, there is no knowing whether or not it can be had at the next term of court, two months or more hence. Should a plea of guilty be entered, or a conviction had, the same grounds for pardon will exist then as now. It will not prevent the President from extending the executive clemency if, in his judgment, there are good grounds for such action. The conviction will in no way affect the question. The discretion and responsibility in that matter rest upon the executive, and not upon the courts.

We are clearly of the opinion that the application for a continuance should be denied, and it is so ordered.

UNITED STATES *v.* C. HUFFMASTER.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MAY 21, 1888.

1. UNITED STATES CIRCUIT COURTS—JURISDICTIONAL AMOUNT.—Under the act of March 5, 1887 (Supp. Rev. Stats. 173), the circuit courts have no jurisdiction of an action to recover money or property wherein the United States are plaintiffs, unless the amount or value of the matter in controversy exceeds the sum of five hundred dollars, exclusive of costs.

Before SAWYER, Circuit Judge.

Mr. J. T. Carey, United States Attorney, for plaintiff.*Mr. Wm. H. Cook*, for defendant.

SAWYER, Circuit Judge. This is a suit by the United States for the value of fifty cords of wood, cut upon the public lands

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in Colusa County by the defendant, and converted to his own use. The wood is alleged to be of the value of two hundred and fifty dollars, for which sum plaintiffs demand judgment. The suit was brought on June 6, 1885, when the act to determine the jurisdiction of the circuit courts of the United States, etc., approved March 3, 1875 (Supp. Rev. Stats. 173), was in force. The objection is made by the defendant that the amount in controversy being less than five hundred dollars, this court has no jurisdiction, and that the action must be dismissed on that ground. The court is of the opinion that the objection is well taken. The clause in the act of 1789 (1 Stats. p. 78, sec. 11), giving jurisdiction to the circuit courts in this class of cases, reads as follows:—

“That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners.”

It is perfectly clear that, under this act, the circuit courts would not have jurisdiction in a case of this kind brought by the United States, where the amount sought to be recovered is less than five hundred dollars. The language is susceptible of but one construction.

In the Revised Statutes, which were only intended to collate and consolidate the existing statutes without changing the meaning, section 629, covering these matters of jurisdiction, arranges the subject-matter in classes, and expresses the various provisions in language as well as arrangement somewhat different from that found in the original statutes then in force. The provision embracing the subject-matter of this suit is as follows:—

“Sec. 629. The circuit courts shall have original jurisdiction as follows: *First.* Of all suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party *Second.* Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners. *Third.* Of all suits at common law where the United States,

or any officer thereof suing under the authority of any act of Congress, are parties.”

It is contended that, under this third clause, the value of the matter in controversy, as an element of jurisdiction, was eliminated in all actions at common law wherein the United States are plaintiffs, and that this provision is applicable to the case in hand. It may be doubtful what the effect of the change in the language and arrangement is, but it is not probable that any change in the law was contemplated by the commissioners, for that would be to exceed their authority. Whatever the construction should be, however, it cannot affect this case, for the whole subject-matter was again gone over, and embraced in the act of March 3, 1875, in which these several provisions determining the jurisdiction of the circuit courts in such matters was reconstructed; and the question raised must be determined by the provisions of that act. Section 1 of the act of 1875 provides as follows:—

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners,” etc.

Thus Congress returns substantially to the language used in the act of 1789, and makes beyond question the value of the matter in controversy an essential element in the jurisdiction. If, therefore, section 629, Revised Statutes, will bear the construction insisted on by the United States attorney, it is necessarily in conflict with the act of 1875, and is expressly repealed by section 10 of that act. (See *Hyde v. Ruble*, 104 U. S. 410; *King v. Cornell*, 106 U. S. 396; *Railroad Company v. Bates*, 119 U. S. 464.) It follows from the views expressed that the circuit court has no jurisdiction of this case, the value of the matter in dispute being only two hundred and fifty dollars, and it must be dismissed on that ground. The United States will have to go into the state court if they desire to recover; and it is just that

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it should be so, as it would be a great hardship upon litigants if they were compelled to go four or five hundred miles from home to litigate such small amounts with the government, as many would be obliged to do in this state.

Let the suit be dismissed, without prejudice, for want of jurisdiction.

UNITED STATES v. L. HUFFMASTER.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MAY 21, 1888.

1. CIRCUIT COURTS—JURISDICTIONAL AMOUNT. — Under the act of March 3, 1887 (24 Rev. Stats. 552), the United States circuit courts have no jurisdiction of an action to recover money or property wherein the United States are plaintiffs, unless the amount or value of the matter in controversy exceeds the sum of two thousand dollars, exclusive of costs.

Before SAWYER, Circuit Judge.

Mr. J. T. Carey, United States Attorney, for plaintiff.

Mr. Wm. H. Cook, for defendant.

SAWYER, Circuit Judge. This is an action to recover the possession of sixty cords of wood cut upon the public lands, alleged to be of the value of three hundred and seventy-two dollars. The suit was commenced on July 12, 1887, and it therefore falls under the provisions of the act of March 3, 1887, amendatory of the act of 1875, to determine the jurisdiction of the circuit courts of the United States, etc. (24 Stats. 552.) The provision of section 1, conferring jurisdiction, is, in all respects affecting the question of jurisdiction in this case, substantially the same as in the act of 1875, except that it raises the value of the matter in controversy in order to give jurisdiction from five hundred dollars to two thousand dollars. The value of the wood sought to be recovered being much less than two thousand dollars, the court has no jurisdiction, and, as in the preceding case (No. 3,704), and for the reasons therein given, the suit must be dismissed, without prejudice, for want of jurisdiction, and it is so ordered.

Points decided.

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UNITED STATES v. C. HUFFMASTER.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA,

MAY 21, 1887.

Before SAWYER, Circuit Judge.

Mr. J. T. Carey, United States Attorney, for plaintiff.*Mr. Wm. H. Cook*, for defendant.

SAWYER, Circuit Judge. This is an action similar to the last, to recover one hundred and fifty cords of wood cut upon public lands, of the alleged value of nine hundred and sixty dollars, commenced on July 12, 1887. For reasons given in the two preceding cases (Nos. 3,704 and 4,998), the suit must be dismissed, without prejudice, for want of jurisdiction, and it is so ordered.

JOHN J. HOLLAND v. J. A. BROWN ET AL.

DISTRICT COURT, DISTRICT OF OREGON.

MAY 22, 1888.

1. DAMAGES FOR DEATH. — The damages given to an administrator for the death of his intestate by the statute of Oregon (Comp. 1887, sec. 371), are, when recovered, assets of the estate; they do not include anything but what is consequent on the death, and therefore no allowance can be made for the expenses of the illness attendant on the injury which caused the death, or of the burial of the deceased.
2. *IDEM* — SECURITY FOR LIFE. — These damages are in the nature of a compensation paid by the wrong-doer to creditors and next of kin of the deceased for the loss of life in which they have a pecuniary interest, and incidentally the liability to pay them is calculated to secure from carriers and corporations more consideration for the lives of passengers and employees committed to their care.
3. CASE IN JUDGMENT. — Ferry-boat No. 2 and the steam launch Mikado collided in the Wallamet River, in front of the Portland slip of the former, and thereby caused the death of a passenger on the latter, when such collision might have been avoided and the death prevented by the proper handling of either boat. *Held*, the owners of both boats are liable to the administrator of the deceased under the statute of Oregon, *in solido*, for the damages resulting from such death.

Before DEADY, District Judge.

Mr. William H. Effinger, for the libellant.

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Mr. Rufus Mallory, for the defendants, Brown and McCabe.

Mr. John W. Whalley, for the defendant Koehler.

DEADY, J. This suit is brought by the libellant as the administrator of the estate of Philip J. Holland, deceased, against the defendants, J. A. Brown and William L. McCabe, as owners of the steam launch *Mikado*, and Richard Koehler, as the receiver of the United States circuit court of this district, of the property of the Oregon and California Railway Company, the owner of the steam ferry-boat No. 2, to recover damages for the death of said Philip, alleged to have been caused by the concurring negligence and misconduct of the persons in charge of said boats, respectively, on October 26, 1886.

The owners of the *Mikado* and the receiver answer separately, and the controversy has assumed a three-sided form—each defendant practically admitting that the deceased came to his death by the fault of the person in charge of the other's boat. Brown and McCabe also allege that the negligence of the deceased contributed to his death; and both defendants allege that his death was no loss to his estate. The character in which the libellant sues is admitted.

From the pleadings and evidence in the case, and a view of the vicinity where the injury occurred, I find the following facts:—

On and before October 26, 1886, the Oregon and California Railway Company was the owner of the steam ferry-boat No. 2, then running under the direction of the defendant Koehler, receiver as aforesaid, as a ferry-boat on the Wallamet River, between her slip at the foot of F Street, in Portland, and her landing on the east side of the river—a distance of about 1,000 feet across the stream and 800 feet down the same from said slip.

The ferry-boat is a double-ended, heavy side-wheel, iron boat of great power, about 130 feet long and 54 feet wide over all—her guards projecting beyond her hull some 10 to 12 feet, and about 8 feet above her water line; and is capable of making 12 miles an hour, and of stopping when under way, at full speed, in about 70 feet.

At the same time the defendants, Brown and McCabe, were

the owners of the steam launch Mikado, then engaged in carrying passengers between Portland and Albina—a distance of about a mile—starting from her dock in Portland, between D and E streets, and about 360 feet above the ferry slip. The Mikado is a propeller, about 45 feet long and 12 feet beam, and can make 10 to 12 miles an hour. She has a pilot-house a few feet aft of her stem, back of which is a cabin on deck and an open space at the stern, for the accommodation of passengers, of which she can carry sixty.

Brown and McCabe are stevedores, and the Mikado was being used by them to carry their workmen down the river, to assist in loading and unloading vessels. Brown usually acted as pilot, for which he had a license from the United States inspectors. At this time the owners of the Mikado were under contract with Robert MacIntosh, a ship carpenter of Portland, to carry his workmen to and from their employment between the termini of her route at so much a month.

On the morning of October 26, 1886, the Mikado was at her dock with thirty-five or forty passengers on board, mostly workmen going to their day's labor, including the deceased, who was then in the employ of MacIntosh as a "liner" of ships and "handy man." Brown, the pilot, was not on hand. Arthur Jones, a youth between seventeen and eighteen years of age, who is now engaged as fireman on the Northern Pacific Railway, and was then employed on the boat in some subordinate capacity, often took the wheel under Brown's direction. The time having arrived for the passengers to go to their work, Jones undertook to make the trip as pilot. Accordingly, the Mikado was started out, head up stream, and swung around until her bow pointed down stream, at about 250 feet from the west shore and her dock, when Jones observed the ferry-boat coming out of her slip on the way across and down the river to her east shore landing. He immediately gave one blast of his whistle, to signify that he intended to pass to the right. The pilot of the ferry-boat immediately responded with one whistle and instead of porting his helm and passing to the right, up stream, stopped his engines. At the time these signals were given the ferry-boat had moved out from her slip about 20 feet, and

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the Mikado was about 300 feet above the point, where the courses of the two boats, if continued, would cross each other at right angles.

The ferry-boat had not yet gotten steerage way and was moving directly across the river at about 3 miles an hour, while the Mikado was moving down stream at about 5 miles an hour, with her helm slightly to port. The ferry-boat, by force of the impetus already obtained, continued to move forward through the water after her engines were stopped, and the Mikado did not change her course or slacken her speed until the collision was imminent or unavoidable, when she ported her helm and stopped her engine. About the same time the ferry-boat reversed her engines.

The port side of the bow of the Mikado came in contact with the starboard side of the ferry-boat, about 20 feet aft, at an angle of about 45 degrees, and ran under the latter, which pushed the pilot-house of the Mikado with Jones in it off into the river on the starboard side.

At and just before the collision took place, the deceased with two other passengers was standing on the deck of the Mikado in front of the pilot-house. One of them saved himself by jumping overboard and the other by springing up onto the guard of the ferry-boat. But the deceased was caught about the head, between the guard and pilot-house and badly hurt, from the effects of which he subsequently died. Among other injuries, his jaw was broken and his skull fractured at the base, which resulted in an abscess on the brain, that was the immediate cause of his death.

There was neither wind nor current to interfere with the action or management of the boats, and either could have been stopped, backed, or turned aside without difficulty in time to avoid the collision.

From these facts but one conclusion can be drawn. The management of both boats was in fault. The first duty of a person in charge of a vessel, particularly where the lives of passengers are at risk, is to avoid a collision by all means.

The Mikado was moving at the rate of 5 miles an hour, and the ferry-boat at the rate of 3, when the whistles were

blown. The former would cross the course of the latter in a distance of 300 feet. The ferry-boat was then 20 feet from shore, and her length was 130 more, which made her bow 150 feet out in the stream. The ferry-boat was making $4\frac{1}{2}$ feet a second, and the Mikado $7\frac{1}{2}$ feet in the same time. At this rate the Mikado would pass over the 300 feet in a little less than 41 seconds, while the ferry-boat would move forward 150 feet in a little more than 36 seconds, and thus bring them both to the point of intersection within less than 5 seconds of each other.

From this it is evident that it ought not to have escaped the attention of a competent and attentive pilot, that if the two boats continued to move as they did at and after the whistles were blown, the Mikado would most likely collide with the ferry-boat at some point along her length of 130 feet. The engineer of the ferry-boat testified that he got the bell to reverse the engine in about a half minute after they were stopped. In that time the ferry-boat would move over about 140 feet, which would put her bow 290 feet from the shore and at right angles with the course of the Mikado, when her engines were reversed. It is therefore quite evident, notwithstanding the testimony to the contrary, that the engines of the ferry-boat were not reversed until or just before the moment of collision.

These conclusions as to distances, times, and rates of speed, are, of course, only approximately true. They are drawn from widely discrepant and contradictory statements of witnesses, most of which are at best but indefinite impressions and off-hand guesses.

But of this fact there is no doubt. These two boats came into collision under circumstances from which it plainly appears that either of them might easily have kept out of the other's way, and that the death of Philip J. Holland was caused thereby.

The pilot of the ferry-boat, after responding to the signal of the Mikado, and seeing that she was about to pass directly in front of him, ought to have reversed his engines at once, and thus have avoided the collision. Instead of this, he allowed his boat to keep moving forward towards the point of collision, apparently relying on the fact that there was plenty of room for the Mikado to pass to the starboard of him, and if she did not

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keep out of the way, and a collision occurred, she would certainly get the worst of it, and be more careful in the future.

On the other hand, when Jones saw that the ferry-boat was moving through the water at right angles with his course, and her forward end within less than 200 feet of it, he ought to have ported his helm and passed at least 100 feet in front of her, or reversed his engines and waited for her to go by. Instead of this, he wilfully held on his way, acting apparently on the idea that, as he had what, by virtue of the signals, he called "the right of way," he was justified in passing so far to the left as to compel the ferry-boat not only to stop her engines, but to reverse them to back out of his way; and this, notwithstanding there was a breadth of not less than 700 feet of good water on his right, the very side of the river to which he was bound, and the obligation he was under to carry the deceased and his fellow passengers safely, so far as practicable, "by the exercise of human care and foresight." (*Shoemaker v. Kingsbury*, 12 Wall. 376.)

Indeed, I think the Mikado was primarily in fault, in undertaking to cross the bow of the ferry-boat in such proximity to it, while it was moving forward, especially while there was so much open water and free way on her starboard. The signal made by the Mikado did not give her the absolute "right of way" over any particular part of the river. It only signified that the Mikado would pass to the starboard of the ferry-boat, and therefore the latter must pass to her starboard, or slow up, or stop until she got by. It would have been very inconvenient for the ferry-boat to have kept under way and ported her helm, as that would have taken her up stream, while her course was diagonally down stream. Therefore, she might properly slow or stop until the Mikado passed. But the ferry-boat is a large machine—a floating bridge—an established and licensed method of transit, moving to and fro at regular and short intervals on the line of a great interstate thoroughfare; and in my judgment it is an abuse of the sailing rules prescribed by section 4233 of the Revised Statutes—particularly in and about the wharves and harbor of this city, for every little cockle-shell of a craft that catches the ferry-boat coming out of her slip, to whistle for the so-called "right of way," and thus compel her,

not only to stop her engines, but reverse them, so the cockle-shell can pass immediately in front of the great boat with impunity, instead of waiting a few seconds until she has passed on.

But in this proceeding the misconduct of the one party does not excuse the other. The pilot of each boat was bound, irrespective of the propriety of the conduct of the other, to do what he could to avoid a collision on account of the danger to human life.

In the consideration of this question no specific effect has been given to the fact that the Mikado did not have a licensed pilot at the wheel. For thus acting without license, Jones may be proceeded against under the law, personally, and Brown has already paid a fine. But in this suit the only inquiry so far as the Mikado is concerned is, was she in fault, whether managed by a licensed or unlicensed pilot. But in considering the propriety of Jones' conduct on the occasion, it is impossible to altogether overlook the fact that he was an inexperienced and determined youth, who probably was more concerned to assert what he called his "right of way" against the "big boat" than to avoid a collision.

Although this suit was brought on the theory that this court might have jurisdiction of the wrong complained of, without the aid of any statute of Congress or the state, and therefore the damages were only limited by the judgment of the court, yet on the hearing it was admitted on the authority of the case of *The Harrisburg*, 119 U. S. 199, that the right to damages at all was derived from the statute of the state, which limits the amount to \$5,000, and therefore the claim in the libel for \$10,000 damages was abandoned. In addition to the claim for general damages the libel contains a claim for special damages, arising from the expenses of the last sickness and burial of the deceased, amounting to \$1,415.

A statute of Oregon (Comp. 1887, sec. 371), gives the administration of a person whose death "is caused by the wrongful act or omission of another," a right to recover damages therefor, not exceeding \$5,000. The damages when recovered are assets of the estate, and must be disposed of accordingly. They are assessed for the pecuniary injury to the deceased person's estate

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caused by his death. Nothing is therefore allowed for the sufferings of the deceased, nor as a solace to the survivors.

The right to these damages may be enforced in the admiralty, whenever the wrong which caused the death occurred, as in this case, on a navigable water of the United States. (See *Holmes v. Railway Company*, 6 Sawy. 262, and cases there cited; also *Ladd v. Foster*, 31 Fed. Rep. 827.)

In estimating the damages resulting from the death of the deceased to his estate, his age, health, habits, and disposition, and capacity to labor and make and save money and acquire property must be considered. (*Holmes v. Railway Company*, 6 Sawy. 832.)

The deceased was about forty years of age, and in good bodily health and strength. He was not, in the full sense of the term, a skilled workman; but his brother, the libellant, is a master ship carpenter, and the deceased worked at and about this business and was considered a willing "handy man." His employer at the time of his death, a master ship carpenter, with whom he was once a partner, gave him employment about half the time at \$5 a day. Another master workman said he paid for the same kind of work \$4 a day. At the same time the evidence shows that he was what is called a "good fellow," given more or less to drink and dissipation when not employed, and although he had no one but himself to support, died worth nothing. There are some circumstances, however, which tend to show that a short time before his death he had gone to live with his brother, the libellant, and was intending and attempting a new and better life. He does not appear to have been married, and his relatives, so far as the evidence discloses, are the libellant and a sister.

He was capable of earning probably \$4 a day for 300 days in the year, and supposing he would lay up \$400 a year of this sum for 20 years, the simple money value of his life might be worth the present sum of \$5,000. But it is impossible to say whether he would have done so or not. It is possible that he might; but the probabilities are all against it.

The case of *Railway Company v. Barron*, 5 Wall. 90, arose under an Illinois statute that contained a direction, which, though not expressed in the Oregon statute, is fairly implied in it. It reads: "The jury may give such damages, as they shall deem a

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fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000." In commenting on this statute the court, speaking by Mr. Justice Nelson, says: "We do not think it necessary to prove actual pecuniary loss. It can rarely be done. The attempt to do it would substitute the opinions of witnesses for the conclusions of the jury. The facts proved will enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed."

In *Penn. Ry. Co. v. McCloskey*, 23 Pa. St. 526, a case arising under a somewhat similar statute, it is said: "The principle which requires compensation for the death of a freeman is not at all new in history. It was long an institution among our Anglo-Saxon ancestors; and perhaps it was never positively abolished, but rather died out under the influence of the Norman conquest and the centralizing power of the king's courts, which treated all such wrongs as wrongs done to the king, and hence as criminal offenses. It seems to have been an institution common to all Germanic nations, and perhaps to every people that rose one degree above the savage life, and were still striving to rise. With them it was intended as a compensation to surviving kindred, and as a means for preventing the disorders that follow in the train of private revenge."

This was the ancient Saxon *weregild* or price of a homicide or other crime, whereby a fixed pecuniary compensation was made to the next of kin for the death of a relative. Every man's life had its value, called a *were*, and in the time of King Athelstan, the *were* of every order of persons in the state, from the king to the cheorl, was fixed by law. (Blount's *Law Lexicon*, *Weregild*; 1 Reeves' *Hist. Eng. Law*, 15; 4 Blackst. *Com.* 188, 313.)

And although the primary purpose of the modern statute, like that of the ancient custom, is to provide compensation for the injury rather than to inflict punishment for the wrong, yet, in estimating the damages for the former, it may be well to

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remember that the liability to pay them may have the effect to inculcate a wholesome regard for human life, and compel carriers and corporations having the persons of passengers and employees in their care, to a faithful discharge of their duty towards them.

Giving due weight, then, so far as I can, to these facts, probabilities, and considerations, my judgment is, that the damages for the death of the deceased ought not to exceed \$2,500.

The items of expense of the sickness and burial of the deceased, concerning which any proof was offered, are as follows: 56 days in St. Vincent's Hospital, with day and night nurse, and shroud and liquor, \$168; undertaker, \$94.50; carriage hire, \$23; ferriage, \$5.30; grave, \$15; priest and choir, \$25; physician, \$325. In all, \$670.

I do not think anything can be allowed in this suit for these expenses—at least as such. True, they are the result of the wrongful conduct of the defendants, which caused the death of the deceased. But the action given by the statute is for the death simply. This includes, of course, all such losses to his estate or creditors, and next of kin to whom it belongs, and for whose benefit the action is allowed, as may be fairly implied from the cessation of his life.

The fact on which the damages are computed is death, and its consequences, and not its antecedents or cause. And yet it is manifest that the estate of the deceased is injured or diminished by these expenses. The damages allowed in this case must first be applied by the administrator to the payment of what may be found justly due the creditors of the estate on this account. For this reason it might be proper and convenient to have the probable amount of these expenses considered in estimating the general damages. But as the statute, in my judgment, does not authorize the recovery of damages on any such account, the claim must be rejected.

The defense of contributory negligence remains to be considered.

The burden of proof in this behalf is on the defendant alleging the negligence. The only particular in which it is claimed that the conduct of the deceased contributed to his death is that

he occupied a place on the forward deck instead of the cabin or the after one. Ordinarily, there was no unusual danger in being there. There was nothing to indicate that passengers were not allowed forward of the pilot-house. Jones does not say that he gave the passengers any warning on the subject on this occasion, though he thinks he did speak of it at some other time in the hearing of the deceased. If this was a dangerous position under ordinary circumstances, it was the duty of the owners of the boat to provide some means of restraining or warning passengers from going there. The fact that on this occasion the deceased and two others stood on this deck just in front of the pilot-house, right under the eye of the pilot, without a word or suggestion from him to the contrary, proves that the position was not regarded by the latter as one of any particular danger.

But it is said that he was negligent in remaining there after the collision was imminent. But that is not at all certain. He might have thought, as one of his companions did, that the safest course was to remain and take the chance of getting on the big boat at the point of collision before the little one was run down. His companion, who jumped overboard, said he did so rather than undertake to get back along the narrow space between the house and gunwale, because he thought the Mikado was going to be sunk.

The evidence is meager and obscure on this point, it only appearing that of the three persons who stood on this deck, one jumped overboard, and another sprang up on the guard of the ferry-boat and was saved, while the deceased, who for ought that appears, was intending and trying to escape in the same way, was caught by the head between the guard and pilot-house, as in the jaws of a vice, and crushed so that he died; and but for the fact that the pilot-house gave way and was pushed overboard, he probably would have been killed outright. However, the deceased having been placed in this dangerous predicament by the fault of the defendants, they are liable for his death, even if it appears that it was possible for him to have escaped unharmed. The law does not require skill, diligence, or good judgment from a person in such a situation or moment of danger and excitement, but regards him as one *in extremis*, whose conduct, though

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erroneous or unwise, it does not consider a fault. (*Ladd v. Foster*, 31 Fed. Rep. 831, and cases there cited.) The defendants having by their concurrent negligence caused the death of the deceased, are liable *in solido* for the damages. (*Ladd v. Foster*, 31 Fed. Rep. 835, and cases there cited.)

The libellant is entitled to a degree against the defendants for the sum of \$2,500 and costs and disbursements of the suit.

THE UNITED STATES v. H. SCHNEIDER.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 4, 1888.

1. ESTOPPEL BY VERDICT. — An estoppel by verdict occurs where each of two causes of action, though not identical, include some identical fact or circumstance, and there is a verdict and judgment in an action on one of them whereby the parties are estopped to allege anything concerning such fact or circumstance contrary to such verdict.
2. VERDICT IN A CRIMINAL ACTION DOES NOT ESTOP PARTIES IN A CIVIL ACTION. — A verdict in a criminal action between the United States and S., which necessarily negatives the allegation in the statement of the cause of action, that S. was "a wholesale dealer in malt liquors," does not estop the United States from alleging that fact in a civil action against S. to recover the special taxes due from him as such dealer.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the plaintiff.

Mr. Frank V. Drake, for the defendant.

DEADY, J. This action is brought by the United States to recover from the defendant the sum of one hundred and fifty dollars, the sum being the amount of the special tax alleged to be due from the latter as a wholesale dealer in malt liquor, between November 1, 1883, and November 1, 1886, in this district.

On September 19, 1887, the defendant answered the complaint and denied the material allegations thereof, and on March 9, 1888, he filed a second answer, containing the defense, that the plaintiff is estopped to allege in this action that the defendant was a wholesale dealer in malt liquors between the dates

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aforesaid, because on the trial of a criminal action heretofore brought by the plaintiff against the defendant, to recover a penalty for the non-payment of these same taxes, in which the defendant pleaded not guilty, the jury, on May 26, 1887, found the defendant not guilty, and the court gave judgment on the verdict accordingly; that on the trial of said action it was admitted that the defendant had not paid any special taxes as alleged in the information, and the case was submitted to the jury by the court on the question of whether the defendant did carry on the business of wholesale dealer in malt liquor, as alleged, and the jury by their verdict, found that he did not.

Section 3244 of the Revised Statutes provides, that wholesale dealers in malt liquors shall pay a special tax of fifty dollars; and section 3242 declares that any person who carries on the business of such dealer without having paid the special tax therefor shall be liable for the payment of the tax, and also a fine of not less than ten dollars nor more than five hundred dollars.

If there is any estoppel in this case, it is not by judgment but by verdict. The causes of action in the criminal and civil are not identical—the one being for a penalty and the other for taxes. Both may be maintained concurrently or successively, and a judgment in the one cannot be pleaded in bar of the other.

Where each of two causes of action, though not identical, include some identical fact or circumstance, and there is a verdict and judgment in an action in one of them, the parties thereto are estopped to allege anything concerning such fact or circumstances contrary to such verdict; and this is called estoppel by verdict. (Bigelow on Estoppel, 48.) It is admitted by the demurrer that the defendant was charged in the criminal action with being a wholesale dealer in malt liquors, and that the finding of the jury therein necessarily contradicted such allegation. This fact is also a material element in this action for taxes. The two actions arise out of exactly the same circumstances. It is material to allege and prove, in either case, that the defendant was a wholesale dealer in malt liquors. And the question now is, can the finding of the fact in the criminal action, that the defendant was not a dealer, be pleaded as an estoppel in this civil action?

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As a general rule this cannot be done, for the reason that the parties to the two actions are seldom the same—the criminal one being prosecuted by and in the name of the state, and the civil one, by the party injured, by the act or conduct constituting the crime. (1 Greenleaf on Evidence, sec. 537; 4 Wharton on Evidence, sec. 776.) But it so happens that the parties are the same in both these actions.

Another reason given against the estoppel in such cases is that the rules of decision and the course of proceedings are not the same in the two actions, and therefore different results may properly be reached in the trial of them. (1 Greenleaf on Evidence, sec. 537; 1 Wharton on Evidence, sec. 776.)

Many of the differences in the rule of decision and procedure in criminal and civil actions have been done away since the establishment of this rule. Parties are now competent witnesses in criminal as well as civil cases, at least on their own behalf, and the only material difference in this court is, that in the former case the verdict must be for the defendant, unless the evidence establishes his guilt beyond a reasonable doubt, while in the latter it is given for or against him, according to the preponderance of evidence.

This, in theory at least, is a material difference, and it may be that the same jury on the same evidence acting on this rule would find the defendant was a dealer in malt liquors, as alleged in this civil action, and refuse to do so in a criminal one. Therefore, the United States is not estopped, by the verdict in the criminal action, to allege and prove in this one that the defendant was a wholesale dealer in malt liquors.

The demurrer to the defense is sustained.

THE UNITED STATES OF AMERICA v. FORTY-EIGHT POUNDS
OF RISING STAR TEA, ETC., ETC.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE 7, 1888.

1. INDIANS—TRADING IN THE INDIAN COUNTRY—ABANDONING RESERVATION—
KLAMATH RESERVATION. — By act of Congress of April 8, 1864, the President was authorized to set apart not exceeding four tracts of land in California for Indian reservations, and in his discretion to include therein existing reservations. The lands in existing reservations not thus retained were to be sold as therein provided. Four reservations were accordingly set apart, among which the previously existing Klamath reservation was not included; but possession of the latter, which contained about forty square miles, and on which were about two hundred Indians, was retained by the United States, and some steps were taken towards its disposition. *Held*, that the Klamath reservation was not "Indian country" within the meaning of the Revised Statutes, United States, section 2138, prescribing the penalty for unlicensed trading in the Indian country.

Before HOFFMAN, District Judge.

Mr. J. E. McElrath and *Mr. D. T. Sullivan*, for claimant.*Mr. John T. Carey*, for the United States.

HOFFMAN, J. It is not denied that the claimant traded with the Indians residing on what has been known as the Klamath River reservation in this state.

The question to be considered is, is the land so known, "Indian country" within the meaning of the section referred to.

The Klamath Indian reservation was created by executive order, dated November 16, 1855, pursuant to the act of March 3, 1855. It embraced a tract of land extending twenty miles up the river from its mouth, and one mile in width on each side of the river.

It would seem from official reports, that during the years following the establishment of the reservation some two thousand five hundred Indians were collected upon it.

In 1861, nearly all its arable lands, with the improvements thereon, were destroyed by floods, and the reservation was rendered almost worthless.

In this condition of affairs, the Indian agent, Mr. Hanson, strongly urged the selection of a new reservation to replace the destroyed Klamath reservation.

This recommendation was adopted, but it would seem merely to afford a temporary refuge for the Klamath Indians, and on the 9th of April, 1862, the lands known as Smith River reserve, or such of them as had not already been purchased by Mr. Hanson from individuals, were by order of the secretary of the interior withdrawn from sale "for the present."

The project of removing the Klamath Indians to a new reserve was carried out only in part. Between four hundred and five hundred of those Indians were actually removed. As they were self-supporting, subsisting almost entirely on fish, it was not deemed expedient to force their removal, or to restore the old reservation to the public domain.

About three years after the flood, Superintendent Wiley reported that there were only seven hundred and forty-five Indians at the Smith River agency.

What became of those Indians, and of the large number said to have remained on the "destroyed" and worthless Klamath reservation, does not distinctly appear. The Smith River reserve was discontinued by act of Congress of July, 1868; and the testimony in this case shows that the number of Indians on the old Klamath reservation is now only about two hundred. Their number is not constant, as many seek employment in the adjacent country.

On the 8th of April, 1864, an act of Congress was passed "for the better organization of Indian affairs in California."

By this act, the two superintendencies theretofore existing were consolidated into one, and the President was authorized to set apart, at his discretion, not exceeding *four* tracts of land within the limits of California, to be retained by the United States as Indian reservations.

The President was further authorized, in his discretion, to include in such tracts any of the reservations theretofore set apart in the state, and to enlarge the same to such an extent as he might deem necessary to adapt them to their intended purpose.

The lands of the existing reservations, not retained by the President, were, by the third section of the act, directed to be surveyed into parcels of suitable size, which were to be appraised at their cash value, and offered for sale at public outcry; but

no lot was to be sold for less than its appraised value, nor for less than \$1.25 per acre. The lands not so sold were thereafter to be held subject to sale at private entry, according to such regulations as the secretary of the interior might prescribe.

It will be noted that by this act the lands of the old reservations, not embraced within the new reservations to be set apart by the President, are not restored to the public domain, nor subjected to the operations of the general land laws.

They are to be surveyed "into lots, or parcels, of suitable size," to be appraised and sold at auction to the highest bidder. The lots are to be of "suitable," but indefinite size. No right of pre-emption is to be acquired by settlement or occupation; and the lands not sold at auction are to be held subject to private entry, not under the general land laws, but according to such regulations as the secretary of the interior may prescribe.

Under the provisions of this act four reservations were selected and set apart by the President.

1. The Tule River reservation by executive order of October 3, 1873. Modified by executive order, August 3, 1878. By this last order a part of the lands included in the order of October was restored to the public domain.

2. The Hoopa Valley reservation by executive order of June 23, 1876.

It appears to have been suggested, that the Klamath reservation should be included within or in some way attached to the Hoopa Valley reservation. But this suggestion does not seem to have been adopted. In the executive order, the boundaries of the latter reservation are distinctly defined. They embrace an area of 89,572.43 acres; but do not include any portion of the abandoned Klamath River reservation.

3. Round Valley reservation, by executive orders of March 30, 1870, April 8, 1873, May 18, 1875, and July 26, 1876.

4. Reserves for Mission Indians by executive orders of January 31, 1870, December 27, 1875, May 15, 1876, August 25, 1877, and various orders and modifications of orders unnecessary to enumerate.

Assuming that the various reserves known as Mission Indian reserves were made under the provisions of the act of April 8,

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1864, and constitute one reservation, it would seem that the authority conferred upon the President by that act has been exhausted.

That authority was, as we have seen, to set apart "*not exceeding four tracts of land to be retained by the United States for the purposes of Indian reservations.*"

It is evident that among these, the former Klamath reservation, considered to be "nearly worthless," was not included. The lands of that reservation thus became subject to the provisions of the third section of the act, relative to the disposition to be made of the "several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act."

In the communication addressed to the district attorney by J. D. C. Atkins, commissioner of Indian affairs, he states, that he does not find that any steps were ever taken to sell the Klamath reservation as an abandoned reservation under the third section of the act of April 8, 1864, "nor has the general land office even been advised of the relinquishment of the same."

But in the case of the appeal of John McCarthy from the decision of the general land office suspending his pre-emption filing on a tract of land within the Klamath reservation, the secretary of the interior sustained the decision of the land office, and states that "the Klamath reservation has been regarded as an Indian reservation since the passage of the act of April 8, 1864, limiting the Indian reservation in *California to four, and that various allotments within its limits have recently been made;*" and he quotes his letter of March 26, 1883, to the commissioner of Indian affairs, in which he stated that "when the selections within said reservations were all made he would consider the question of restoring the remainder of the lands to the public domain."

It is evident that the secretary was dealing with the land as directed by the third section of the act of 1864, and that *some* steps had been taken to carry out the provisions of that section. That the lands continued to constitute a reservation in the sense that they were not open to entry under the general land laws was undoubtedly true. But they constitute an abandoned reser-

vation, to be disposed of as specifically provided for in section 3 of the act of 1864.

Mr. Commissioner Atkins states, it will be noticed, that the general land office has never been "advised of the relinquishment" of the reservation.

This must be true. Nor has any executive order been made restoring the lands to the public domain.

The Klamath River reservation not having been "retained for the purposes of Indian reservations," under the act of 1864, nor included within either of the four tracts of land set apart under its provisions, the third section took effect as a relinquishment of the lands "for the purposes of Indian reservations."

But the United States still retained possession of the lands for the purpose of disposing of them, as directed by that section.

To have restored them to the public domain, and thus subjected them to the operation of the general land laws, or to have permitted the intrusion of settlers, pre-emptioners, or holders of Valentine scrip, would have made it impossible to carry into effect the provisions of section 3, in regard to their disposition.

Such being, in my judgment, the legal status of these lands, the question arises, can a person, who has traded with Indians on the Klamath River, be prosecuted under the provisions of section 2133, which forbid the introduction of goods "into the Indian country," or trading with the Indians therein?

The nature of the trade carried on by the claimant is not disputed.

He has not resided in the reservation lands, and has made no settlement therein. At the proper season he proceeds with his vessel to the river and employs the Indians to fish for him, supplying them with seines and other appliances.

He pays them "in trade," furnishing them with various articles composing the cargo of his vessel.

They are set forth in the libel of information, several hundred in number, and their condemnation is prayed for.

They consist in great part of articles suited to the wants of the Indians; tea, coffee, boots, shoes, overalls, hickory shirts, medical stores, etc., etc.

The very intelligent officer in charge of the Hoopa reserva-

tion, and who exercises some care and supervision over the Klamath Indians, stated to the court that he knew of no grounds of public policy, or of consideration for the welfare of the Indians, opposed to the traffic carried on by the claimant. The Indians are enabled to find employment, and receive in return for their labor supplies, the use of, and taste for which must tend to promote their civilization, and their gradual renunciation of the habits and modes of living of savages.

The offense of which the claimant is accused is thus purely technical, nor is the suppression of the traffic demanded by any consideration of policy, morals, or humanity.

Whether he has committed any offense must therefore be determined on technical grounds.

Assuming that trading with Indians on a reservation constitutes trading with Indians in an Indian country, my opinion is that the Klamath lands are not such a reservation as brings them within the meaning of the term "Indian country."

The lands are not reserved "for the purposes of Indian reservations."

The government retains possession of them for the purpose of selling them, as directed by law.

If these lands do not constitute an Indian reservation, they are certainly not an "Indian country."

They are held by the United States for sale. And even if this were not the case, the residence of two hundred Indians on a tract forty square miles in area would not make the whole tract "Indian country," within the meaning and intention of the law.

Libel of information is dismissed.

Opinion of the Court—Sawyer, C. J.

[June,

HUNT v. PATCHIN.

CIRCUIT COURT, DISTRICT OF NEVADA.

JUNE 8, 1888.

1. **MINES AND MINING—LOCATION AND ACQUISITION—TRUSTS—CONFIDENTIAL RELATIONS.**—The owners in common of mining claims, owing to difficulty in raising money to pay the taxes and do the labor required by statute to prevent a forfeiture of the claims, after extensive correspondence between complainant, who was the principal owner, and defendant, who was acting as manager of the mines, determined to allow a forfeiture, and let defendant immediately relocate the claims in new names, which he did in his own name alone, after writing for advice to complainant, who prepared and sent him a form of notice in his name as locator. *Held*, that a trust attached to defendant's title in favor of his associates.
2. **SAME—LIMITATION OF ACTIONS—RUNNING OF STATUTE.**—An action begun May 18, 1885, to enforce such trust, the relocation having been made January 1, 1883, is not barred by the statute of Nevada limiting to two years the time for commencing an action to recover a mining claim, where there was no intimation that defendant denied the trust until May 29, 1883, when, in answer to one who delivered a message from complainant in relation to a sale of the mines, he said that he had relocated the whole mine in his own name, but if a sale was made he would do the square thing by his associates.
3. **SAME—FAILURE TO SET UP ADVERSE CLAIM.**—Where defendant, after relocating a mining claim in his own name for the benefit of himself and associates, and after action brought to enforce the trust, applies to enter the land as mining ground, advertises in pursuance of the statute, and, no protest having been made, pays the purchase money, and has a certificate of entry issued to him, the complainant's right is not concluded by the certificate, though he does not set up an adverse claim, and bring suit to establish his right within the time allowed by statute, as his title is not adverse to, but a part of, that upon which the certificate was obtained.

Before SAWYER, Circuit Judge.

In equity. Bill to establish a trust in certain mining claims.

Mr. J. D. Torreyson and Mr. A. B. Hunt, for complainant.*Mr. Trenmore Coffin and Mr. George S. Sawyer*, for respondent.

SAWYER, Circuit Judge. This is a bill in equity to establish a trust in three mining claims in favor of complainant, and to compel a conveyance to him of the undivided fifty-one sixtieths parts. For some years prior, and down to January 1, 1883, the complainant, the defendant, and one James were owners as tenants in common of three silver mining claims in Eastern Nevada, of which complainant held thirty-one sixtieths, James twenty sixtieths, and defendant nine sixtieths. These propor-

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tions were fixed by a mutual interchange of conveyances. The interest of James, whatever it is, has become vested in complainant, making his interest now, if he has any, fifty-one sixtieths, and that of defendant nine sixtieths. During the year 1882, the parties found it inconvenient to raise money enough to pay the taxes, and do the amount of work on the claims required by the statute to prevent a forfeiture, so as to render them liable to relocation. On this account, towards the close of the year 1882, there was considerable correspondence between complainant, living in San Francisco, and defendant, living in Eastern Nevada, as to the best course to pursue; and the letters are in evidence. It is manifest from this correspondence, and the testimony of the parties, that it was thought best, and this was acquiesced in by all, that the money should not be invested in keeping up the old claims by performing the required labor, but instead, that at midnight of January 1, 1883, or immediately thereafter, the defendant should regard the old title as forfeited, and relocate the mines under new names, for the benefit of the then owners. There had been considerable litigation on the title of the old claims, and as no work had been done by anybody during the preceding year, it may have been thought that this relocation of forfeited claims would give a clear title. However that may be, it is perfectly clear from the correspondence and testimony that this proceeding was determined upon, and it is apparent also, that it was understood that the mines should be relocated in the name of defendant alone, but for the benefit of all; for in response to a letter from defendant asking advice how he should proceed, complainant gave the necessary advice, and prepared and forwarded a form of notice for a location in the name of defendant alone, with his name appended as locator. This particular notice so prepared was not in fact used, but other notices, similar in substance, were prepared and put up, with the name of defendant alone as locator. It is clear to my mind that complainant understood, and had a right to understand from the action of defendant, that the location was to be made for the benefit of all the owners. If defendant did not so intend he acted in bad faith, for complainant could not, from his correspondence and action under the circumstances, have understood

the matter otherwise. Besides, complainant sent to defendant something over eighty dollars for payment of the taxes of 1882, which was retained as late as February after the relocation, which he would not have been likely to do, if he had not supposed the relocation had been made for the benefit of all. And the retention of the money confirmed that idea. The complainant resided in San Francisco, nearly a thousand miles away from the mines, while the defendant resided at the mines in Eastern Nevada, and had, theretofore, been the managing man there. The haste manifested in making the location soon after midnight arose from the fact that other parties were supposed to stand ready to relocate immediately after the expiration of the year 1882. I am entirely satisfied that these claims were relocated under the new names at the time for the benefit of all of the original owners, or else they were located in bad faith by defendant, after giving his associates, by his conduct, the right to believe, and when they did believe that the location was for the benefit of all. Under this state of facts I am clearly of the opinion that a trust arises in favor of complainant under the operation of law. Defendant, before and up to the relocation, was managing the mines on behalf of himself and his co-owners, constantly consulting with them. He was in a position of trust in this particular, and bound to protect their interests. It was his duty not to permit a forfeiture for the purpose of relocating and acquiring the whole for himself without their knowledge and consent. By conferring with them and arranging to forfeit and relocate for the benefit of all, he misled them, and violated the confidence reposed in him, if he relocated clandestinely for the benefit of himself alone. By this act, and this breach of faith, he threw his associates off their guard, and prevented them from taking other means to protect their interests.

The Civil Code of California embodies the rule as it before existed, under the common law in equity jurisprudence, and as it now exists in Nevada, without a code, in the following language:—

“One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful acts, is, unless he has some other and better right thereto, an involuntary

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trustee of the thing gained, for the benefit of the person who would otherwise have had it." (Civ. Code, 2224.)

Here was fraud, for the complainant, who resided nearly a thousand miles away, was induced, by defendant's action, to believe that the claims would be forfeited and relocated for the benefit of all, and by these means the defendant in violation of his faith relocated, or he claims to have done so, for his own benefit alone. He stood in a confidential relation to complainant, being an associate owner intrusted with the management of the property. His duty, certainly, was to deal fairly by his associates. In my judgment there was fraud, also a violation of trust. If not, then defendant surely got the title to these claims by "other wrongful acts." The acts were not rightful, and, if not, they must have been wrongful. In *Lakin v. Sierra Buttes Gold Mining Co.* 11 Sawy. 238; 25 Fed. Rep. 337, a case similar, but not exactly like this, it was held that "where one party, wrongfully, obtains the legal title to land, which in equity and good conscience belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner." Can it be doubted on the facts as they appear in the pleadings and evidence, that defendant got whatever title he has to the interest of complainant and James in the mines in question, through a breach of faith and confidence? It seems to me not. He must therefore be charged as trustee of their interests.

It is next insisted that the provision of the statute of limitations of Nevada, limiting the time to two years for commencing an action to recover a mining claim, is applicable, and that the suit is barred. Conceding, for the purposes of this case, that the two-years clause applies, the question then arises, when did the statute begin to run? The complainant says, from the time of relocating, January 1, 1883, the act of relocation in the name of defendant alone being of itself a hostile act, manifesting an intention to repudiate the rights of defendant's associates and to claim for himself alone. I do not think so, as we have seen the forfeiting of the old title and relocation was not an adverse proceeding, but one taken by the mutual understanding of the parties for the benefit of all. Defendant did not announce to

his associates in this proceeding that he took action for himself alone, but, on the contrary, all his correspondence and conduct held out to them the idea that he was acting, not for himself, but for the interest of all, and it was, manifestly, with this understanding that he was not only permitted, but encouraged, to proceed. He did not then put himself in a hostile attitude towards them, but pretended to be acting for them. The trust, as we have seen, at once attached, and when a trust attaches, the statute of limitations does not begin to run against the beneficiary, and in favor of the trustee with respect to the trust property, until the trustee brings the knowledge of the repudiation of the trust home to beneficiary of the trust. I am satisfied that when the relocation was made, it was made in good faith for the benefit of all; that it was so intended at the time; and that the determination to claim all was an after-thought. When defendant first changed his mind, and determined to repudiate the rights of his associates, does not appear. The repudiation could not have been brought to complainant's notice in February, when he sent the eighty odd dollars to pay the taxes of the preceding year; for he certainly would not have sent it after being informed that defendant claimed for himself alone the whole property taxed. And at that time defendant retained and appropriated the money to some uses without informing complainant of his purposes. The relocation was made January 1, 1883; two years from the time of receiving and appropriating the money would be as late as March 1, 1885. During the month of May, 1883, Mr. Eisenman had an interview with complainant, at his office in San Francisco, in which the latter spoke of his interest in these claims in such terms as to leave no doubt, that at that time he had no idea that his right was denied or repudiated by defendant, and he sent a message to defendant by Eisenman relating to a sale of the property, and mentions a person likely to purchase. This message was delivered to defendant on May 29, 1883, when defendant observed, that he had relocated the whole mine in his own name in January; but if a sale should be made he would do the square thing by complainant and James; and the witness says that "I concluded from the conversation with him that he recognized the interest of Hunt and

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James." There was, certainly, no distinct repudiation of complainant's right at this time, and this is the first time that anything appears tending in the slightest degree to indicate an intention to repudiate. Whatever defendant's secret intent might have been before that time, the conduct of complainant in sending the message shows that at that time he did not have the slightest idea that his right was denied. Defendant's intention had, manifestly, not been brought to the notice of complainant. The bill in this case was filed May 18, 1885, within two years after the receipt by defendant of this message from complainant to him. As the repudiation of the interest of complainant had not been brought to his notice by defendant, his trustee, at that time, the statute had not then begun to run, even if the two-years clause is applicable, and the bill was, consequently, filed in time. If a trustee, whether of an express trust, or of a constructive trust, arising by operation of law, repudiates his trust, the statute of limitations will not begin to run in his favor as to the subject-matter of the trust, till his denial of the trust is distinctly brought to the notice of the *cestui que trust*, and if the trustee relies upon the statute the burden is on him to show when notice of the repudiation is brought to the notice of the *cestui que trust*. It does not appear in this case that complainant had such notice two years before the filing of the bill. On the contrary, it is manifest from the evidence that he did not. The suit, therefore, is not barred.

But one other point has sufficient plausibility to require notice. After this bill was filed defendant applied to enter the land as mining ground, advertised in pursuance of the statute, and no protest having been made, in due time he paid the purchase money and a certificate of entry was issued to him. It is now insisted that as complainant did not protest, and then bring suit to establish his right within the time prescribed by statute, he waived all adverse claim, and the entry is conclusive. But it was on this very title which defendant in part holds in trust, that he obtained his certificate of entry. It was on these relocations, which defendant held in trust, that he proceeded, and the entry gives effect to the relocation with the trust attached. This suit was pending at the time of application for purchase, to

Points decided.

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establish, not the legal title, but a trust in it. This claim by complainant of a trust was not adverse to the possessory title upon which the entry was made, but a part of that title, and the trust which had attached before the entry, followed the title upon the entry based upon the possessory title of which it was a part. (See *Lakin v. Sierra Buttes Gold Mining Co.* 11 Sawy. 238; 25 Fed. Rep. 337.) The complainant is entitled to the benefit of this entry to the extent of the trust.

There must be a decree for fifty-one sixtieths of the mining ground in question, in pursuance of the prayer of the bill, with costs, and it is so ordered.

GOLDMARK ET AL. v. KRELING ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE 10, 1888.

1. COPYRIGHT—COMMON-LAW RIGHT—RIGHTS OF PURCHASER—SUBSEQUENT PUBLICATION.—Where an author sells the exclusive right to use an operetta in America, and the purchasers are in possession of the manuscript before there is any publication in this country or Europe, the author cannot thereafter sell the right to a third person to perform it in this country, or dedicate it to the public by publication, so as to defeat the purchasers' prior exclusive right.
2. SAME—INFRINGEMENT—WHAT CONSTITUTES—OPERETTA "NANON."—Plaintiffs were the exclusive owners of the manuscript copy of the operetta "Nanon." Defendants were producing a play under the name of "Genée's Nanon, the reigning Eastern and European sensation," which they claimed to have translated and adapted from an old French story, "Nanon." Both plays contained eight characters in common, not in the French; one character had the same name in each, different from the French; the scenes and situations in each were alike, each had ideas expressed alike, not in the French; and defendants advertised their adaptation as "Genée's," and not as their own, from the French. *Held*, that defendants' play was substantially the same as complainants', with only colorable changes; that plaintiffs were entitled to an injunction to restrain defendants from performing it as a whole, or the piano score, the libretto, containing the dialogue, stage business, situations, etc., or any part as performed by defendants, except the orchestration, which was their own work, or any work under the name of "Nanon" or "Genée's Nanon, the reigning Eastern and European sensation."

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and
HOFFMAN, District Judge.

In equity. On bill to enjoin the production of an opera.

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Complainants, Leo Goldmark and another, filed a bill against Joseph Kreling and others, to enjoin them from producing the operetta "Nanon," basing their right of action on their common-law right of ownership, and not on a copyright. For proceedings dissolving the injunction for failure to give proper bond, and the subsequent re-instatement of the case, see 11 Sawy. 215, and 25 Fed. Rep. 349.

Mr. Jos. D. Redding, for complainants.

Mr. W. W. Cope and *Mr. H. H. Lowenthal*, for defendants.

By the Court, SAWYER, Circuit Judge. We shall limit ourselves to briefly indicating the points of our decision without any elaborate discussion of the evidence. The law protecting the rights of authors in their compositions, literary and musical, where they have not been dedicated to the public, or published with the authors' consent, is well established.

In this case, although the piano score was published in Europe, it does not appear very clearly, if at all, that it was with the authors' assent. But assuming that it was with their consent, the testimony of both Goldmark and Conried is that it was not published, or any part of the operetta, with their consent, either in Europe or America. The operetta was completed in September, 1884, and a manuscript copy immediately transmitted by the authors to Goldmark and Conried, who purchased the exclusive right to use it in America, before it was written, so that they were the exclusive owners for America, and in possession of the manuscript before there was any publication of any part in Europe or America. The authors certainly could not have sold and conveyed any right to a third party to perform their operetta in America so as to cut off the prior exclusive right conveyed to Goldmark and Conried. If they could not cut them off by subsequent sale, we do not perceive how they could do it by a subsequent dedication to the public by publication. In our judgment, defendants had no right to use the piano score, even if it had been published by the authors in Europe after the right of complainants had attached. We are not certain that it was published with the consent of the authors. There is no direct evidence of it,

and the testimony of Goldmark and Conried tends the other way. But concede it to be so, there was no consent of complainants in whom the exclusive right for America had already vested.

That the defendants made their own orchestration from the piano score is conceded. Admitting that they had a right to use it, alone, or with any other matter in which the complainants had no exclusive vested right, still, they did not have a right to perform the play as a whole, with the orchestration, or the orchestration with any part of the operetta not dedicated to the public, as they advertised, and were proceeding to do. The respondents do not claim that the dialogue, and stage work belonging to it, had ever been published with the authors' consent, or that it had ever been dedicated to the public. They do not claim a right to use that part of the operetta. Their position on this point, is, that they did not use it, but made a new and independent adaptation from an old French story, "Nanon, Ninon, et Maintenon," which, they say, they sent to Paris for, and there obtained. Joseph Kreling's testimony is positive, that he never saw or heard "Nanon," as performed by the complainants, but that he translated and adapted the French play, exhibit 2. The complainants, Goldmark and Conried, on the contrary, testify, that defendants' operetta is taken bodily from complainants' operetta. In their affidavits resisting a preliminary injunction, the defendants did not pretend to then have, or know, positively, of the French play; but stated on information and belief, that there was one which could be had. This fact casts suspicion on their good faith now. The complainants' play is found in exhibit D, and respondents' in exhibit called their "prompt book," and the French play, from which defendants claim to have made the adaptation in exhibit 2. Upon comparison it will be found, as we think, that respondents' adaptation is, substantially, that of complainants', with only colorable changes. There are several characters—eight, we believe—in complainants' operetta that are not in the French play, and all these characters are also in the defendants'. One character, D'Auviere, in the French play, has an incognito name, "Lavalier," whereas his incog. name in both complainants' and defendants' play, is, Grignan. The scenes and situations in complainants' and defendants' adaptations are

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alike, and different from the French. Exhibits 3, defendants' operetta, and D, complainants', have ideas expressed in common, not found in the French, and one character in common—the king—not in the French. We are satisfied, notwithstanding their denial, that the defendants must have adapted their play from the complainants', and not from the French. They also advertised the operetta as being Genée's work, and not their own, from the French. They called it "Genée's Nanon, the reigning European and Eastern sensation." We have no doubt, also, that the evidence is sufficient to show that Genée and Zell were the authors. The defendants deny, argumentatively, in their answer, the allegation of authorship, but not in such form as to make it evidence. They argue it, on the theory, that the Frenchman was the author, and not Genée, and do not pretend to have personal knowledge. Besides, in all other parts of the answer, and in their testimony, they, unconsciously, often speak of it as Genée's. Every exhibit they put in, to show a publication, both in the German and English, represents it as Genée's, and there is no suggestion, anywhere, that anybody else is the author. The public accept it as theirs. Besides, Conried testifies, that he was in Vienna, while they were writing it, before it was finished, and that portions of it were played, or rehearsed to him by Genée. Genée and Zell assumed to be the authors, and sent the manuscript to New York to them as authors. The evidence, in our judgment, is sufficient to establish the authorship, and so it was held in one of the pamphlet cases cited (*Goldmark v. French*), where a similar question as to authorship was raised on less satisfactory testimony than there is in this case. The authorship in that case was sustained. We are of opinion, therefore, that the defendants should be restrained from performing the operetta as a whole, and from performing the piano score, or the libretto containing the dialogue, stage business, situations, etc., or any part of the operetta as performed by defendants, and threatened to be performed by them, except the orchestration, which was their own work; and that they should, also, be restrained from performing any operetta under the name of "Nanon," or as "Genée's Nanon, the reigning European sensation," etc. Let a decree be entered accordingly, with costs.

Opinion of the Court—ROSS, J.

[June,

JONES v. MARTIN ET AL.

SAME v. MOLL ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

JUNE 11, 1888.

1. PUBLIC LANDS—MEXICAN GRANTS—PATENTS—BOUNDARY—ON SEA SHORE.—Where a patent confirming a Mexican grant describes the land as follows: "Beginning on the sea-shore at station number 31 of the Ballona Rancho," the plat of the survey annexed to the patent representing this common corner of the two ranchos as commencing on the sea-shore, it is to be construed that the land is at that point bounded by the sea, i. e., ordinary high-water mark.
2. SAME—CALLS—LOCATION OF LINE.—Under a description of a rancho in part as follows: "Thence south 41 degrees and 15 minutes east, . . . at 40 chains and 89 links, Santa Monica bath-house on the left," etc., the left being within the rancho, a line cutting through the Santa Monica bath-house, leaving more than twenty feet of it outside of the rancho, is not a true location of the boundary of the rancho.

Before ROSS, District Judge.

At law. Ejectment.

Messrs. Wells, Van Dyke & Lee, for plaintiff.*Mr. George W. Knox*, for defendants.

ROSS, J. These actions involve the same question and by agreement of counsel were tried and submitted together. The question is, what is the true location of the westerly boundary of the Rancho San Vicente y Santa Monica, which was a Mexican grant, confirmed and patented by the government of the United States. The rancho is described in the field-notes embodied in the patent as "beginning on the sea-shore at station number 31 of the Ballona Rancho, and running thence, according to the true meridian, the variation of the magnetic needle being from 14 degrees and 30 minutes east, to 14 degrees 35 minutes east, north 49 degrees, east along the line of the Ballona Rancho; at 2 chains and 10 links east, bank of arroyo, bearing north and south; at 3 chains and 50 links, top of bank, bearing north and south; at 3 chains and 80 links, a fir post, 48 by 4 by 2 inches, marked 'S. V. S. M. I. W. C.,' from which the northeast corner of H. Hancock's house bears south 40 degrees and 30 minutes east, 204 links distant," and thence by various

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courses, distances, and calls to the easterly boundary of the Rancho Boca de Santa Monica, along which the line, according to the field-notes, runs "south 23 degrees west; at 15 chains and 24 links, a road, course northeast; at 27 chains and 30 links, a road, course north and south; at 53 chains and 40 links, a road, course northeast and southwest; at 54 chains and 35 links, a trail, course northeast and southwest; at 59 chains, sumac stake, marked 'B. S. M.'; at 89 chains and 80 links, Arroyo Santa Monica, 75 links wide, runs southwest; at 92 chains and 35 links, the brow of the Cañada Santa Monica bearing north 56 degrees east and southwest; at 96 chains leaves dense sage brush, bearing east and west; at 104 chains enters grain field, bearing northwest and southeast; at 111 chains and 85 links leaves grain field, bearing northwest; at 120 chains, the brow of the cañada, bearing north 20 degrees west; at 123 chains and 85 links, Marquez' house, bears north 74 degrees west; at 129 chains a grain field on the left; at 139 chains a redwood post, 48 by 4 by 2 inches, 12 inches deep, marked 'B. S. M.,' from which an old adobe house, built by Reyes, standing on the brow of the Cañada Santa Monica, bears south 68 degrees and 30 minutes west, 187 links distant, and Marquez' house bears north 17 degrees and 30 minutes west; at 139 chains and 35 links, a road, course east and west; at 140 chains and 80 links, a road, course north 20 degrees west, and south 20 degrees east; at 145 chains and 85 links enters grain field east and west; at 176 chains and 50 links, a sycamore post, 48 by 4 by 4 inches, marked 'B. S. M. 11 W. C.,' set 12 inches deep in earth, and surrounded by a mound 24 inches high; on top of bluff, leaves grain field; at 188 chains, foot of bluff; 190 chains to a stone mound at the southeast corner of the Rancho Boca de Santa Monica station; thence along the coast of the Pacific Ocean south 59 degrees and 30 minutes east, 3 chains and 30 links to station; thence south 48 degree and 30 minutes east; at 33 chains a barranca in bluff to left the southeast corner of the juridical possession of the Rancho Boca de Santa Monica, 60 chains to station; thence south 41 degrees and 15 minutes east; at 16 chains and 25 links a stairway runs northeast up the bluff; at 18 chains and 30 links a small bath-house on the

left; at 20 chains and 70 links, a small bath-house on the left; at 40 chains and 89 links, Santa Monica bath-house on the left; at 42 chains and 47 links a walk runs northeast up the bank to the town of Santa Monica, about half a mile distant; at 48 chains and 50 links, the old wharf of the Los Angeles and Independence Railroad, bearing northeast and southwest; the town of Santa Monica is on the bluff, which is about 75 feet high; at 51 chains and 35 links, a road running northeast up the bluff to Santa Monica 77 chains, to the place of beginning." Annexed to the field-notes embodied in the patent is a plat of the survey, which shows the Pacific Ocean to be the westerly boundary of the ranchos San Vicente y Santa Monica, Boca de Santa Monica, and Ballona.

Upon the trial of the case, one surveyor on the part of the plaintiff and two on the part of the defendants testified that they recently ran the westerly line of the Rancho San Vicente y Santa Monica according to the field-notes of the official survey, which survey was made in the year 1881. The surveyor for the plaintiff took as his point of commencement the post upon the bluff on the line of the Rancho Boca de Santa Monica, and in running the meander line down the coast by the field-notes of the official survey it was found to leave a narrow strip of sand beach of varying width between the line and the water mark at ordinary high tide until nearing the initial point of the rancho, which, according to the line as thus run, would be located a few feet below low tide. The line as thus run, however, leaves to the left the barranca in the bluff, the two small bath-houses, the Santa Monica bath-house, and the other objects stated in the patent to be to the left of the line, and includes within the lines of the rancho the premises occupied by the defendants. The surveyors on the part of the defendants took as their point of commencement the initial point of the Rancho San Vicente y Santa Monica, which they located, not on the sea-shore, but a short distance from it, and, reversing the courses and distances given in the patent, ran the line up the coast. The line thus run cut through the Santa Monica bath-house, leaving more than twenty feet of it to the seaward, and leaving the premises occupied by most of the defendants, which is a part of the sand

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beach, and most of the possessions of the other defendants, also a portion of the sand beach, without the lines of the rancho.

I consider it very clear that the line as located by the defendants' surveyors is not the true location of the westerly boundary of the rancho—*First*, because their starting point was not correct. The rancho in question is described in the field-notes of the patent as beginning on the sea-shore, at station No. 31 of the Bal-lona Rancho, and the plat of the survey annexed to the patent, and forming part of it, represents this common corner of the two ranchos as commencing on the sea-shore. When it is declared that the point of commencement is a given point on the sea-shore, the unmistakable meaning is that there is nothing between that point and the shore of the sea. In other words, that the land described is at that point bounded by the sea; that is to say, by ordinary high-water mark. *Secondly*. The line as located by the defendants' surveyors cuts through the Santa Monica bath-house, leaving more than twenty feet of it outside of the rancho, whereas it is distinctly declared in the field-notes of the patent that that bath-house, as also two smaller ones to the north of it, all of which it was shown by the evidence were in existence when the official survey was made, were to the left of the line as run by the government surveyor, and consequently within the lines of the rancho; and they are so represented on the plat. In view of these facts, it is unnecessary to consider the improbability of the government survey having been run through the Santa Monica bath-house, which, it is shown, was at the time of the official survey, and yet is, a large and prominent structure, conducted for bathing purposes, in front of the town of Santa Monica, which the patent declares and shows to be located on the bluff, about half a mile distant. If it be conceded that the westerly boundary of the rancho does not extend to ordinary high-water mark, the evidence leaves no doubt in my mind that the line run in accordance with the courses and distances given in the patent includes the premises occupied by the defendants; and therefore, in view of conceded facts in the case, the plaintiff is entitled to recover. But I am of the opinion that the true westerly boundary of the rancho is not the meander line of the surveyor, but the Pacific Ocean, which means the

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line of ordinary high tide. As has been seen, the rancho begins on the sea-shore at the northwesterly corner of the Rancho Ballona; thence the line runs easterly, and by various other courses, until it strikes the coast again, and thence along the coast by various courses and distances to the place of beginning on the sea-shore. The meander line down the coast was necessary for the purpose of ascertaining the quantity of land embraced within the survey. But that the ocean, and not the meander line, as actually run on the ground, was intended to be the westerly boundary of the rancho is clearly shown by the fact that upon the official plat, made from the field-notes, and annexed to and forming part of them, the meander line is represented as the line of the ocean. (See *Railroad Company v. Schurmeir*, 7 Wall. 278.)

There must be judgment for the plaintiff in each case, and it is so ordered.

J. H. FISK v. D. V. B. HENARIE ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 11, 1888.

1. REMOVAL OF CAUSE FOR PREJUDICE OR LOCAL INFLUENCE.—The act of 1887 (24 Stats. 552), does not repeal subdivision 3 of section 639 of the Revised Statutes (act of 1867), prescribing the procedure or method of procuring a removal of a cause on account of prejudice or local influence; and an affidavit by the party seeking such removal, to the effect that he believes he will not obtain justice in the state court on account of prejudice and local influence, is sufficient to authorize the same.

Before DEADY, District Judge.

Mr. George H. Williams and *Mr. George H. Durham*, for the plaintiff.

Mr. James K. Kelly and *Mr. John M. Gearin*, for the defendants.

DEADY, J. This action was removed to this court on the petition and affidavit of certain of the defendants, who are citizens of California, on the ground of prejudice and local influence.

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A motion to remand was denied (32 Fed. Rep. 417); and the cause was tried here with a jury, who on December 17, 1887, gave a verdict for the defendants.

The plaintiff moves for a new trial, and submits the motion on the single ground that the court erred in refusing to remand the case to the state court—the other grounds of the motion being expressly waived.

Strictly speaking, this is not an error occurring at the trial, for which this motion is the proper remedy. The case may be taken to the supreme court on error, and the ruling of the court in this respect reviewed, and if erroneous, corrected.

But counsel ask the court to reconsider the question in the light of Mr. Justice Brewer's subsequent ruling in *Short v. Chicago M. & St. P. Ry.* 33 Fed. Rep. 114, and I am quite willing to do so.

On the argument of the present motion but one point was made, that it did not "appear" to the court from the petition and affidavit for removal, as required by the act of 1887 (24 Stats. 552), that the defendants will not, on account of prejudice or local influence, be able to obtain justice in the state court, because the probatory circumstances, on which the defendants based their statement to that effect, were not set forth in the affidavit.

In the opinion of this court, on the motion to remand, it was said that the act of 1887 does not provide how the fact of prejudice or local influence "shall be made to appear" to the court. "This class of cases is expressly excepted from the operation of section 3 of the act prescribing the mode of removal thereunder generally. It follows that so much of section 639 of the Revised Statutes as relates to the method of removal on account of prejudice or local influence, and the proof thereof, is not in conflict with the act of 1887, and is therefore still in force and applicable to such removal. . . . It is sufficient that they [the defendants] have made oath that they so believe [that from prejudice and local influence they will not be able to obtain justice in the state courts] without setting forth the facts or circumstances on which such belief is founded."

It is admitted in *Short v. Chicago etc.*, that the act of 1867

(sec. 639, subd. 3, Rev. Stats.), "is not in terms repealed" by the act of 1887; but it is contended the latter act "covers the same ground, and is obviously intended by the legislature to be its expressed will upon the whole subject involved therein," and therefore, "although there may be some provisions in the earlier not absolutely inconsistent with those of the later act, yet the whole of the earlier act is repealed."

But in my judgment this deduction is founded on a misapprehension of the intention of the legislature as manifested in the act of 1887.

The plain purpose of the act, so far as the removal of causes on the ground of prejudice or local influence is concerned, is to provide who may remove a suit for such cause, and within what time, and not to prescribe the procedure or manner of taking the removal.

For instance, by the act of 1867, a suit could be removed on the petition of either party thereto, if he was not a citizen of the state in which it was brought, while the act of 1887 restricts the right to the defendant. The act of 1867 allowed a removal only in a case of "a suit" between citizens of different states, but the act of 1887 gives the right of removal to "any" defendant in a suit who is a citizen of a state other than that in which the same is brought, whenever there is "a controversy" therein between himself and a citizen of any other state. (*Fisk v. Henarie*, 32 Fed. Rep. 422.) The act of 1867 permitted the removal to be made "at any time before the trial or final hearing of the suit," while the act of 1887 limits it to "any time before the trial thereof."

Section 3 of the act of 1887 expressly provides a method of removal in all cases within its purview, except those for prejudice or local influence, which are expressly excluded from its operation in this respect.

From these premises, it appears to me, but one conclusion can reasonably be drawn, that the act of 1887 does not and was not intended to repeal that portion of the act of 1867, contained in subdivision 3 of section 639 of the Revised Statutes, which prescribes the procedure on a removal for prejudice or local influence.

Then again, in considering this question, it is to be remem-

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bered that repeals by implication are not favored, and are never admitted where the former act can stand with the new one. (*Wood v. United States*, 16 Peters, 362; *Ex parte Yerger*, 8 Wall. 105; *Chew Heong v. United States*, 112 U. S. 549.)

In *Wood v. United States*, *supra*, Mr. Justice Story, speaking for the court on a question of the repeal of a statute by implication, says: "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

In *Hills v. Richmond*, 33 Fed. R. p. 81 (C. C. Dis. of Ga.), Judge Hill considers this question, and comes to the conclusion that the act of 1887 does not change the practice where a defendant seeks to remove a case on the ground of prejudice or local influence.

The decision in *Short v. Chicago*, *supra*, does not go so far as to hold that the affidavit must contain the facts on which the affiant bases his belief, but only that the fact of prejudice or influence must be positively stated.

The petition in this case, which is verified by the oath of the defendant Henarie, does state the fact of prejudice and local influence positively. But the affidavit thereto is that the petition is true, as the affiant "verily believes." The affidavit for the removal, which is sworn to by the defendants, Henarie and Eleanor Martin, states that the affiants "have reason to believe, and do believe and so state," that from prejudice and local influence the defendants will not be able to obtain justice, etc.

A duly verified petition is so far an affidavit, that if it contains the necessary averments, a removal may be had thereon. This petition states positively the fact of prejudice and local influence. Nor is the force of this statement affected by the fact that the defendant swears it is true as "he verily believes." Of-

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course, what he believes to be true he may state as a fact. If he had sworn that the petition was true, without saying, "as I verily believe," he would have neither said nor meant anything more than "I swear it is true because I believe so."

In fact, the difference between saying, "I *believe* I cannot get justice in the state court on account of prejudice and local influence," and "I cannot get justice in the state court," etc., without saying whether I believe it or not, in my humble opinion is the difference between tweedledum and tweedledee.

The statement in the affidavit proper, in addition to the belief of the affiant, contains a positive averment of the fact of prejudice and local influence. It is in effect a declaration that the affiant has reason to believe, and does believe, a certain fact to exist, and therefore "states" that it does. And this is equivalent to saying that the fact exists without saying that he believes it, which is understood.

I conclude then that the fact of prejudice and local influence is "made to appear" to the circuit court whenever it does so appear from the affidavit of the party causing the removal; and that it does so appear, whenever such party states on oath that it is so, or that he believes it to be so.

The motion for a new trial is denied.

EX PARTE ELI MORRILL ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 18, 1888.

1. DEPUTY MARSHAL AT ELECTION FOR A REPRESENTATIVE IN CONGRESS—ARREST WITHOUT PROCESS—PROBABLE CAUSE OF ARREST.—A special deputy marshal of the United States in the course of his duty made an arrest under section 2022 of the Revised Statutes, at an election for a representative in Congress, and took the party before a United States commissioner, where he was charged with aiding and counseling a person to vote at such election who had no legal right to vote, and discharged on bail; and immediately made a complaint against said deputy before a police judge, accusing him of the crime of assault and battery, by assaulting and beating the complainant, on which a warrant of arrest was issued and he was taken and lodged in the county jail; thereupon on the petition of the deputy a writ of habeas corpus was allowed by the district judge, returnable into the circuit court, then in session; and from the return to the writ it appeared that the process under which the jailer claimed to hold the deputy was the said

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warrant of arrest. On the hearing the court found that the deputy had probable cause, at the time of the arrest of the party, to believe that he had committed the crime of aiding and counseling a person to vote at such election, who had no right to vote thereat, and that the alleged assault and battery with which the deputy was charged consisted simply in the arrest of the complainant without force or violence for the crime aforesaid. *Held*, that a special deputy marshal appointed under section 2021 of the Revised Statutes, to keep the peace and preserve order at the polls at an election for representative in Congress, is, as to such election, and the crimes for which, under section 2023 of the Revised Statutes, he may make arrests without process, a peace officer; (2) that a crime is committed "in the presence" of such deputy, within the provisions of said section 2023, when the facts that are within his observation in connection with what, under the circumstances, may be considered common knowledge, give him probable cause to believe or reasonable ground to suspect that such is the case; and, (3) probable cause or reasonable ground to suspect, is such a state of facts as will constitute a defense to an action for false imprisonment or malicious prosecution, and it is sufficient if the facts or appearances are sufficient to induce a reasonable probability that all the acts which constitute the crime have been done.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the petitioner.

Mr. Alfred F. Sears, Jr., for the respondent.

DEADY, J. On June 4, 1888, the petitioner, Eli Morrill, was arrested by a police officer of this city and lodged in the county jail on a charge of assault and battery.

He immediately applied by petition to the United States district judge for a writ of habeas corpus, alleging in his petition that he was a deputy United States marshal for the district of Oregon; that in the discharge of his duty as such deputy he was about to arrest a person for aiding and abetting an illegal voter in casting a vote for a representative in Congress, at polling place 3, in South Portland precinct, at an election for such representative then and there being held, when he was arrested by Samuel Parrish without authority of law, and delivered to the custody of the sheriff of Multnomah County and his jailer. The writ was allowed and made returnable forthwith in the United States circuit court, then in session.

The respondent, H. C. Wood, the jailer of Multnomah County, immediately produced the body of the petitioner in court with the original warrant on which the arrest was made, when by consent of parties the respondent had until June the

7th to make a formal return to the writ, and the petitioner until the following day to reply thereto, when the cause should be heard, whereupon an order was made admitting the petitioner to bail in the sum of five hundred dollars.

On June the 8th the parties appeared, and witnesses were sworn and testified for and against the petitioner on the question of the alleged assault and battery, and the alleged grounds of the arrest by the petitioner of Walter F. Matthews for aiding and counseling a person to vote at said election who had no legal right to vote.

From the admissions in the pleadings and evidence I find the following facts:—

The petitioner, Eli Morrill, on June 4, 1888, was a duly appointed and qualified special deputy marshal of the United States for the city of Portland, Oregon, a city of more than twenty thousand inhabitants, under section 2021 of the Revised Statutes, and was authorized to perform the duties and exercise the powers of such deputy at an election for representative in Congress then being held in said city; that about ten o'clock of said day the petitioner, having good reason to believe, from his observation and knowledge, that one Matthew or Mace Cetel or Tetel had voted illegally at said election at polling place 4 in South Portland precinct, the fact being, as it now appears, that said Cetel is an unnaturalized alien, who had not even declared his intention to become a citizen of the United States, arrested him therefor without a warrant, and took him before a United States commissioner in the United States court-rooms, in said city, and there made a complaint against him to that effect; that soon after the arrest of Cetel, the petitioner, having good reason to believe from his observation and knowledge that J. L. Carrol and Walter F. Matthews did aid and counsel said Cetel to so vote illegally, arrested them therefor—the latter being arrested in the hall outside of the door of the marshal's office, whither he had gone to go bail for Carrol, by the petitioner placing his hand on his shoulder, without violence or rudeness, and telling him he was under arrest and asking him to walk into the office, where he remained until he gave bail; that soon after Matthews was discharged, he went before the police judge of the city, hav-

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ing the jurisdiction of a justice of the peace, and made a complaint under oath, accusing the petitioner of the "crime of assault and battery," committed as follows: "The said Eli Morrill, on the fourth day of June, 1888, in the city of Portland . . . did wilfully and unlawfully assault and *beat*" said Matthews—the fact being that the petitioner did not "*beat*" said Matthews or lay his hand on him otherwise than as above stated; that on this information said judge issued a warrant for the arrest of the petitioner for the crime of assault and battery, returnable before himself forthwith, on which is an indorsement to the effect that the same was received on June 4, 1888, and executed by arresting Morrill on the same day, signed "S. B. Parrish, chief of police of the city of Portland, by S. S. Young, police officer;" that said police officer, instead of taking the petitioner before said judge for examination and discharge on bail, or commitment, as required by law and by said warrant commanded, lodged him in the county jail with the warrant without examination or commitment, where he remained until taken out on the writ of habeas corpus.

From the improper conduct of the officer intrusted with the execution of this warrant, taken in connection with the exaggeration and falsehood contained in the information on which it was issued, it is quite evident that the real purpose of the proceeding was to lock up this special deputy, and thus prevent him from performing his duty in guarding the polls against fraudulent votes and practices.

The only question of fact about which there is any substantial conflict of testimony is the part which Walter F. Matthews took in getting Cetel's illegal vote into the ballot-box. On the witness stand he admits that he was engaged on the day of the election at said polling place 3 as a "worker" for one of the political parties, but denies that he took any part in getting Cetel to vote.

It appears that Cetel went first to polling place 3 and offered to vote, and, on being questioned by the judges, he was found to be an unnaturalized foreigner who had not even declared his intention to become a citizen, and his vote was rejected. Morrill, who was standing within plain view of the polling place,

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and saw Cetel, thought he voted there. From this polling place Cetel went directly to the corner of Fourth and Mill streets, near by, where it is admitted Fred D. Matthews, the brother of Walter F. Matthews, and J. L. Carrol were standing. Fred Matthews and Carrol were also engaged at that polling place as "workers" for the same party as Walter F. Matthews.

Fred D. Matthews admitted on the witness stand that he, knowing Cetel had just been rejected by the judges at polling place No. 3, asked Carrol to "go with him to another polling place and see if he couldn't get him to vote"—that is, get his vote in the ballot-box. Carrol made some question as to how he was to get Cetel to a polling place, when Matthews told him to call an express wagon in the service of their party, which stood near by, which he did, when Matthews and Carrol got Cetel in the wagon and Carrol drove off with him to find a voting place. This is the substance of Fred D. Matthews' story, and Carrol's is to the same effect, except that he says Fred D. Matthews came to him on the occasion and said, "Here is a man [Cetel]; take him to polling place 4 and see if you can vote him," which he did, and voted him.

Both of these witnesses seek to make the impression that Walter F. Matthews, although at that poll, had nothing to do with the transaction. The statements in this respect are generally vague, and sometimes evasive. The most direct are these: Fred D. says, "Did not see my brother when man (Cetel) put in wagon;" and Carrol says, Walter F. "had nothing to do with Cetel." True, Fred D. might not have been looking at Walter F. at this moment, and yet the latter may have participated in the consultation and shared in the conclusion that Carrol should take Cetel to polling place 4 and vote him, and then turned away to look after some other Cetel. And it may be true, so far as Carrol saw, that Walter F. had nothing to do with Cetel personally, and yet he may have consulted and advised with his brother concerning his being sent to polling place 4 with Carrol, for, according to his own statement, his attention was not attracted to this matter until Fred D. came to him and said: "Here is a man; take him to polling place 4 and see if you can vote him."

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When Cetel left the window of polling place 3 and went to the Matthews, Morrill testifies that R. G. Church called his attention to the party and warned him of them. Church testifies that about that time of day he saw suspicious characters about the place indicated—the corner of Fourth and Mill streets—in company with “the Matthews boys,” and that he called Morrill’s attention to them, and said, “the Matthews boys are using influence to get suspicious characters to vote.” Morrill swears that he then gave the party his attention, and saw both the Matthews and Carrol talking to Cetel in an urgent manner, when Carrol and Walter F. Matthews got into the wagon with Cetel, and started off. Thereupon he got in a hack and told the driver to follow the wagon, which he did to polling place 4, and by the time he got out of the hack and up to the place, Cetel had voted. On being assured of this fact by the judges, he arrested him and took him back to polling place 3, when the judges and supervisors identified him as the alien who had just before offered to vote there and was refused. The weight of the testimony of the two Matthews and Carrol is affected by their part in, and relation to this transaction; though it must be admitted that Fred D. Matthews appears to have spoken very candidly concerning his own part in it. He admits that he sent Carrol with Cetel to polling place 4 to get his vote in if he could, when he knew that the same had just been refused by the judges at polling place 3 on the ground of his being an alien who had not declared his intentions, which fact must have been strongly corroborated, if not suggested by his imperfect English.

But the testimony of Walter F. is also unfavorably affected by the fact that he made oath to the complaint on which this warrant issued, wherein he positively and explicitly stated that Morrill not only assaulted him, but “beat” him, when he was forced to admit on the witness stand that he was neither “struck” nor “bruised” nor “hurt,” and that the alleged “assault and battery” consisted simply in an arrest, wherein, at most, he now only claims that he was caught by the arm and “rudely” pushed into the marshal’s office and “unceremoniously” set down in a chair—and even that is a gross exaggeration of the

fact, as appears from the testimony of a third person then present.

But it must be admitted that Morrill's testimony on this point is not as satisfactory as it ought to be. When on the stand he admitted that he did not readily or certainly know the Matthews boys apart, though they bear no resemblance to one another. But he was excited and confused, and may have and probably did mean, that he could not distinguish them by their names—did not know which was Fred and which was Walter, or, as he is commonly called, "Jack." They were both in the courtroom, and he undertook to point out the one he saw working with Cetel at the corner of Fourth and Mill, but the men were so nearly in a line that I did not get a clear idea of which one he meant. On the argument it was claimed by counsel for the respondent that he pointed out Fred D., and this being disputed by counsel for the petitioner, and I being unable to say whether he did or not, Morrill was recalled, when he pointed to Walter F., and said positively he was the man. But then he had heard the discussion and was apprised of the importance of the matter. If, under the circumstances, Walter F. was entitled, as a witness, to full credit, I should say that Morrill, after arresting Cetel and Carrol and bringing them to the marshal's office, as he went out met Walter F. in the hall, where he had come from polling place 3 to go bail for Carrol, and knowing that he was a Matthews, he mistook him for his brother, whom he had seen working with Cetel, and arrested him, and as it is, I can but say that possibly this may be the true version of the affair.

And this shows how necessary it is in the administration of these laws to select level-headed, intelligent persons of good standing in the community for the office of supervisor and deputy marshal, so that when any question arises in the courts or elsewhere as to what took place or what was done at a given polling place, they may be relied on for an intelligent and truthful account of the matter.

The portions of the Revised Statutes under which the petitioner was appointed and acting as special deputy marshal when he arrested Walter F. Matthews are taken from the act of May 30, 1870 (16 Stats. 140), entitled, "An act to enforce the right

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of citizens of the United States to vote in the several states of this Union, and for other purposes;" and from the act of February 28, 1871 (16 Stats. 433), amendatory thereof. They relate to the election of representatives in Congress, and are passed in pursuance of the power granted to Congress in section 4 of article 1 of the constitution of the United States, which reads: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations except as to the place of choosing senators."

The constitutionality of this legislation, if there ever was any reasonable doubt about it, has long since been firmly established by the supreme court. (*Ex parte Siebold*, 100 U. S. 391; *Ex parte Yarborough*, 110 U. S. 651.)

In these cases it was held that while the constitution of the United States (Art. 1, sec. 2) adopts the qualification prescribed by the state for a voter for the popular branch of its own legislature as the qualification for a voter for a representative in Congress, yet the right of the latter to vote is based on the constitution and not on the state law, and Congress has a supervisory power over the subject, and in the exercise thereof, to secure legal and fair elections, a free, pure, and safe exercise of the right to vote thereat, and to prevent fraud and violence thereabout may (1) either make altogether new regulations or add to or alter those already prescribed by the state; (2) impose new duties on the state officers of election and provide for the appointment of other officers thereof; and (3) compel the observance of state and national laws regulating such elections by punishing any violation thereof. All state regulations, so long as Congress does not displace or alter them, are in effect congressional regulations; but a regulation made by Congress is of paramount authority and makes void and of no effect any state law which is repugnant to it.

Section 2021 of the Revised Statutes requires the marshal, whenever any election at which a representative in Congress is to be chosen, upon application by two citizens of a town of more than twenty thousand inhabitants, to appoint special deputy marshals, whose duty it shall be to aid and assist the supervisors of election in the discharge of their duties.

Section 2022 requires the marshal and his deputies to “keep the peace” and protect the supervisors in the discharge of their duties; to preserve order at the polls; to prevent fraudulent voting and fraudulent conduct on the part of any officer of election, and immediately to arrest, with or without process, any person who commits, or attempts to commit, any offense against the United States; “but no person shall be arrested without process for any offense not committed in the presence of the marshal or his general, or special deputies, or either of them, or of the supervisors of election, or either of them.”

Section 5511 declares, among other things, that “if at any election for a representative in Congress, any person knowingly votes without having a lawful right to vote,” or if any person shall “aid, counsel, procure, or advise” another to so vote, he shall be punished by a fine of not more than five hundred dollars or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution.

When is an offense “committed in the presence” of a marshal within the meaning of section 2022?

In answering this question consideration must be given to the fourth amendment to the constitution—“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

It has never been understood that this provision was intended to or does prevent an arrest by a peace officer—a sheriff or constable—for a crime committed in his presence. (Whart. Crim. P. & P. sec. 8; Bishop's Criminal Procedure, sec. 181.) The knowledge derived by the officer from his observation, acting under the sanction of his official oath, is considered equivalent to information supported by the oath or affirmation of another.

Now a warrant of arrest may issue on “probable cause” supported by oath, and by analogy a peace officer may arrest on probable cause derived from his own observation. At common law a peace officer might arrest without warrant “on reasonable grounds of suspicion,” and the facts and circumstances which

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furnish such grounds of suspicion amount to "probable cause" under the constitution, which is such cause as will constitute a defense to an action for false imprisonment or malicious prosecution. (Whart. Crim. P. & P. sec. 9; Bishop's Criminal Procedure, 182; Rap. & Law, Law Dict. False Imprisonment; Malicious Prosecution.) Probable cause is a probability that the crime has been committed by the person charged. The facts stated upon oath "must induce a reasonable probability *that all the acts have been done* which constitute the offense charged." (Cranch, J., in *United States v. Bollman and Swartout*, 1 Cranch C. C. 379; *Wheeler v. Nesbitt*, 24 How. 551.)

In other words, a crime is committed in the presence of the officer, when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable ground to suspect that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge or necessary to the commission of the crime.

A special deputy marshal appointed under said section 2021 is, in my judgment, a peace officer touching an election for representative in Congress, and in respect to any crime for which he is authorized to make an arrest by said section 2022. He is specially charged by the statute to "keep the peace" and "preserve order" at the polls during such elections, and to make arrests without process thereat, for crimes committed in his presence; and in my judgment a crime is so committed when the facts and circumstances within his knowledge and observation give him probable cause to believe that a crime has been committed.

This being the case, there is no doubt, on the facts found, that the petitioner had probable cause to believe that Walter F. Matthews had, at the time of his arrest, committed the crime of aiding, counseling, procuring, and advising a person to vote who had no legal right to vote. He saw Cetel vote, or offer to vote, at polling place 3, and saw him soon after vote at polling place 4, in which he was confirmed by the judges in the presence of the illegal voter. He then heard from the judges at polling place 3, in the presence of Cetel and without dissent, that his

vote had just been rejected at that poll, on the ground that it appeared from his own examination that he was not a qualified voter. He saw Matthews, a confessed party "worker" at this polling place, take Cetel soon after in a party express wagon and vote him at polling place 4, under circumstances that warranted the belief that he knew, as he ought to have known, that Cetel was not a legal voter.

As the world goes, one man may persuade another to cast a vote for or against a particular person or party, but the law and good morals require that he should first know or have good reason to believe that the person persuaded is a qualified voter. He acts at his peril. The pollution of the ballot-box with illegal votes is one of the gravest crimes that can be committed against society. For the most part, money is the means by which this result is accomplished; and if political parties may subsidize unscrupulous "workers" to engage in this nefarious business with impunity, the day will come when we may expect the republic to be put up at auction and knocked down to the highest bidder.

To prevent such a result and preserve the purity and integrity of elections for members of the House of Representatives, the acts of 1870 and 1871 were passed by Congress, and if faithfully enforced, as provided, through the agency of competent and trustworthy supervisors and marshals, aided by an honest and patriotic public sentiment, much good will be accomplished and evil prevented.

As was well said by Mr. Justice Miller, in speaking for the court, in *Ex parte Yarborough*, 110 U. S. 666: "It is as essential to the successful working of this government, that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so. . . . In a republican government like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections by violence and corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources."

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Points decided.

It follows from these premises that the crime of assault and battery was not committed by the petitioner on Walter F. Matthews, as alleged in the latter's complaint and stated in the warrant on which the former was arrested; and that the alleged assault and battery was nothing more than the lawful arrest of Matthews by the petitioner on probable cause to believe that a crime had been committed by the former against the United States, and therefore the petitioner is illegally restrained of his liberty, and entitled to be discharged.

But in my judgment the respondent is not authorized to restrain the petitioner of his liberty, even if the latter acted without probable cause in making the arrest of Matthews. The process under which the respondent professes to hold him is not directed to the sheriff or jailer of Multnomah County. Indeed, it is not a commitment at all. The warrant only authorized the officer executing it to bring the petitioner before the officer issuing it for examination, when he would be entitled to be discharged, held to bail, or in default thereof, committed to prison. The police officer, Young, had no authority to deliver the petitioner to the keeper of the county jail, nor such keeper to receive or hold him. His detention by the respondent is, therefore, it seems to me, illegal in any view of the matter.

EX PARTE CHIN KING, ON HABEAS CORPUS.

EX PARTE CHAN SAN HEE ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 25, 1888.

- I. CITIZENSHIP OF CHINESE—HABEAS CORPUS.—A child born in the United States of Chinese parents is by the rule of the common law and the fourteenth amendment, a citizen of the United States; and when restrained of its liberty of locomotion therein, may be delivered therefrom, on habeas corpus, by the proper national court.

Before DEADY, District Judge.

Mr. Paul R. Deady, for the petitioners.

Mr. Lewis L. McArthur, for the United States.

DEADY, J. The writ of habeas corpus in these cases was allowed and issued on June 25, 1888, and they were heard together on the same day.

The petition of Chin King states that she was born in San Francisco, California, on October 10, 1868; while that of Chan San Hee states that she was born in Portland, Oregon, on March 15, 1878; and they each state that they are restrained of their liberty by William Robert Laird, the master of the British bark Kitty, because the collector of customs for this port refuses to allow them to land from said bark, on the ground that the petitioners are Chinese and have no return certificate, as required by the act of Congress on that subject; but they aver that they are native-born citizens of the United States, and therefore not included within the terms of said act.

The return of the master to each writ states that the Kitty sailed from Hong Kong for Portland, on April 19, 1888, and that the petitioners were passengers thereon during said voyage, and are now in custody on board the same for the reasons stated in the petitions.

On application, the United States district attorney was allowed to intervene on behalf of the United States, and allege that he had no knowledge or information sufficient to form a belief as to whether the petitioners were born in the United States as alleged or not.

On the hearing it appeared that Chung Yip Gen is a Chinese merchant who has lived and done business in this city for the past thirteen years, and for twelve years prior thereto in San Francisco; that he was married in San Francisco about twenty-three years ago, and the petitioners are his daughters, the older one having been born in San Francisco and the younger one in Portland, and that in 1881 the father sent them and their mother to China, from whence they were to return when they pleased.

By the common law, a child born within the allegiance—the jurisdiction—of the United States, is born a subject or citizen thereof without reference to the political status or condition of its parents. (*McCuy v. Campbell*, 2 Sawy. 118; *In re Look Tin Sing*, 10 Sawy. 353; *Lynch v. Clark*, 1 Sand. 583.) In the latter case it was held that Julia Lynch, who was born in New

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York in 1849 of alien parents during a temporary sojourn by them in that city, and returned with them the same year to their native country, where she resided until her death, was an American citizen.

The vice-chancellor, after an exhaustive examination of the law, declared that every person born within the dominion and allegiance of the United States, was a citizen thereof, without reference to the situation of his parents. This, of course, does not include the children born in the United States of parents engaged in the diplomatic service of foreign governments, whose residence, in contemplation of public law, is a part of their own country.

The rule of the common law on this subject has been incorporated into the fundamental law of the land. The fourteenth amendment declares: "All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States, and of the state wherein they reside."

In *re Look Tin Sing*, 10 Sawy. 353, it was held that a person born within the United States of Chinese parents, not engaged in any diplomatic or official capacity under the emperor of China, is a citizen of the United States. The case is similar to that of the petitioners. The party in question was born in California in 1870, of Chinese parents. In 1879 he went to China, and returned to California in 1884, without the certificate provided for in the restriction act of 1882, or that of 1884, and was therefore denied the right to land.

Mr. Justice FIELD, in delivering the opinion of the court, in which SAWYER, SABIN, and HOFFMAN concurred, says (p. 359): "The inability of persons to become citizens under those laws (of naturalization) in no respect impairs the effect of their birth, or of the birth of their children, upon the status of either, as citizens of the United States."

The only point made by the district attorney against the petitioners on the question of their citizenship is, that they left this country without, as he claims, any definite or fixed purpose to return.

But I think the evidence does not warrant so strong a statement. For aught that appears they intended to return; and

the fact that they have returned gives strength to the inference. The most that can be said is, there was no time fixed for their return. And that is the case with hundreds of minor American citizens, who go abroad yearly, for nurture and education. But it seems that the citizenship of the petitioners would not be affected by the fact, if they had never come back, unless it also appears that they had in some formal and affirmative way renounced the same.

However, in my judgment, a father cannot deprive his minor child of the status of American citizenship, impressed upon it by the circumstances of its birth under the constitution and within the jurisdiction of the United States. This status, once acquired, can only be lost or changed by the act of the party when arrived at majority, and the consent of the government.

By section 2 of article 4 of the constitution, it is provided: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

It has always been held that the privileges and immunities there referred to are fundamental; and that a citizen of one state may, at least, under this provision, pass through or reside in any other state of the Union for the ordinary pursuits or purposes of life. (*Corfield v. Coryell*, 4 Wash. C. C. 180; *Paul v. Virginia*, 8 Wall. 180.)

The action of the collector in these cases has the effect, and is so intended, to deny these citizens of the United States the right of free locomotion within the same—the right to come into, pass through, or reside in this state, and is therefore contrary to and in violation of the constitutional provision guaranteeing such right to every citizen. Sections 751, 752, and 753 of the Revised Statutes provide in effect that the courts of the United States and the judges thereof shall have power, by habeas corpus, to deliver a person held in custody or restrained of his liberty, in violation of the constitution or of the laws or treaty of the United States.

The petitioners, as we have seen, are restrained of their liberty in violation of the constitution, and therefore this court has jurisdiction to discharge them on a habeas corpus.

The petitioners are discharged from custody.

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Opinion of the Court—ROSS, J.

UNITED STATES v. MCKENZIE.

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

OCTOBER 28, 1887.

1. **POSTOFFICE—LARCENY FROM MAIL.**—The second count in an indictment under the Revised Statutes of the United States, section 5467, charged defendant, a clerk in the Los Angeles postoffice, with stealing therefrom a registered letter addressed to the postmaster at Santa Monica, and intended to be conveyed by mail to him. The evidence tended to show that defendant received the letter, receipted for it, and in the presence of witnesses put it in the Santa Monica pouch, and locked it; that the pouch was received locked at the railway station, and carried safely, and delivered at Santa Monica locked; that, on opening it there, the card of notification was found, but not the letter, and that other persons had access to the Los Angeles postoffice besides defendant. *Held*, that the jury, if they believed this evidence, must believe beyond a reasonable doubt that defendant removed the letter from the pouch before it left the Los Angeles postoffice before they could find him guilty.
2. **CRIMINAL LAW—REASONABLE DOUBT.**—By reasonable doubt is not meant a possible or imaginary doubt, but a doubt that is reasonable in view of all the evidence adduced.
3. **SAME—CIRCUMSTANTIAL EVIDENCE.**—A conviction may be had on circumstantial evidence alone, where all the circumstances distinctly point to the guilt of the accused, and are incapable of explanation upon any other reasonable hypothesis.
4. **SAME—CONFESSIONS AND ADMISSIONS.**—Oral declarations or admissions claimed to have been made by the accused should be viewed with caution, and remarks made by him at the time of arrest or afterwards should be fairly construed in view of all the facts and surroundings. They do not preclude the jury from considering the other facts in the case.

Before ROSS, District Judge.

Indictment found under Revised Statutes of the United States, section 5467.

Mr. J. Marion Brooks, District Attorney, for the United States.

Mr. Stephen M. White, for defendant.

ROSS, J., charging jury. The statute under which the indictment against the defendant was found provides that "any person employed in any department of the postal service, who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the

postal service, or forwarded through or delivered from any post-office or branch postoffice established by authority of the postmaster-general, and which shall contain any note, . . . any bank-note; . . . any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year, nor more than five years." The indictment contains three counts. The first, in effect, charges that defendant, on the 27th of May, 1887, embezzled a certain registered letter containing forty dollars in bank-notes, addressed to the postmaster at Santa Monica, and which was intrusted to defendant, as clerk in the Los Angeles postoffice, to be sent by mail to Santa Monica; the second count, in effect, charges defendant with stealing, at the time stated, from the Los Angeles postoffice, a certain letter addressed to the postmaster at Santa Monica, and intended to be conveyed by mail to him; and the third count, in effect, charges defendant with stealing forty dollars in bank-notes out of a certain registered letter with which he was intrusted, addressed to the postmaster at Santa Monica, and intended for transmission through the mail to the postmaster at that place. There is no evidence as to the contents of the letter spoken of in the evidence, nor does it otherwise answer the description contained in the first and third counts of the indictment; so that your verdict upon the first and third counts must be "not guilty."

But there remains for you to consider the second count—that charging defendant with stealing the letter in question—and you should give to that charge very careful consideration. There is no direct evidence that defendant stole the letter; that is to say, no one, so far as appears, saw him steal it. The government relies for a conviction upon circumstantial evidence. A conviction may be had upon such evidence, provided the circumstances so distinctly point to the guilt of the accused as to leave no reasonable explanation consistent with the theory that he is innocent. In other words, the existence of the inculpatory facts

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must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. You cannot convict the defendant unless his guilt is established to your satisfaction, and beyond a reasonable doubt. Mere suspicion, or even strong suspicion, will not justify a conviction; and should the evidence, in your opinion, preponderate in favor of the government, yet this will not authorize a verdict against the defendant unless the proof is such as to convince you of his guilt beyond a reasonable doubt. But when it is said that you cannot find defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt, it is not meant that you must be satisfied of his guilt beyond a possible doubt; for the human mind is so constituted that some possible or imaginary doubt may arise in regard to all evidence. A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. If, after an impartial comparison and consideration of all the evidence, you can candidly and truthfully say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say that you have a settled conviction of his guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. To sustain a conviction the government must produce evidence clearly showing that defendant is guilty. The defendant need not prove his innocence, but the government must prove his guilt; and the mere fact that there may have been sufficient evidence to justify the postoffice officials in procuring his arrest will not justify his conviction.

In the light of these general instructions it is your duty, gentlemen of the jury, to carefully weigh and consider all of the evidence in the case without sympathy for or prejudice against the defendant. That the letter in question was in the Los Angeles postoffice on the 27th of May last, for transmission in the usual course of mail, to the postmaster at Santa Monica, does not admit of doubt. Whether the letter was stolen from the postoffice at Los Angeles, and whether the defendant stole

it, are the questions for you to determine. If you believe the testimony of the witnesses, Morgan and Mrs. Finn, the letter could not have been stolen from the Santa Monica postoffice. Both of these witnesses testified that when the mail pouch was received by them on the day in question, it was locked as usual, and in good order; and that, upon opening and examining it, the yellow card of notification was found, but there was no registered letter in it. If you believe that Mrs. Finn and Morgan, or either of them, stole the letter, that would end the case against the defendant, and your verdict should be "not guilty." But if you believe their testimony to be true, you must pursue your inquiries further. The mail-pouch was required to be locked before it left the Los Angeles postoffice, and there was no one authorized to unlock it until it reached its destination, the postoffice at Santa Monica. Giroux testified that he received the pouch on the 27th of May, as was his custom, at the railroad car in Santa Monica, and carried it to the postmaster there; that when he received it, it was locked, and in good order, and remained so up to the time he delivered it to the postmaster. The testimony of Mrs. Finn and of Morgan has already been referred to. If you find that the pouch was locked and in good order when it reached Santa Monica, as well as when it left the Los Angeles postoffice, you should not indulge any imaginary or possible doubts in regard to its being tampered with in its transmission from the one place to the other, in the absence of any testimony tending to show that it was so tampered with. The witness Taylor testified that he delivered the letter in question to defendant on the 27th of May, and took his receipt for it, and that he saw defendant put the letter in the Santa Monica pouch; and several of the witnesses testified that defendant subsequently admitted that he did put the letter in that pouch; and two of them—Risley and Culver—testified that defendant admitted to them that he put the letter in the Santa Monica pouch and locked it. Postmaster Green testified that on the day in question defendant was charged with the duty of locking the pouch. If he was, the presumption of law, subject, of course, to be rebutted, is that he performed his duty in that regard, and did lock it. But in respect to the oral admissions or statements

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claimed to have been made by the defendant, I instruct you that such admissions should always be viewed with caution. The imperfection of the medium through which such admissions are transmitted should be considered. The infirmities of memory, and the desire to detect an offender, are subjects which it is proper to keep in view in weighing this character of testimony. Remarks made by the defendant at the time of arrest, or afterwards, should be fairly construed in view of all the facts and surroundings; and, if the defendant stated that the letter in question was taken either by him or at the Santa Monica postoffice, it does not necessarily follow that his statement was correct; nor does that declaration, if made, preclude the jury from considering the evidence for the purpose of determining whether the loss of the letter may not be attributable to some other source. In doing so, however, you are not to indulge in mere speculation, but consider the evidence before you as reasonable men. If you find that defendant put the letter in the Santa Monica pouch, but subsequently, and before the pouch was taken from the Los Angeles office, removed the letter from the pouch with intent to steal it, you should find him guilty under the second count of the indictment. But unless the facts and circumstances of the case convince you beyond a reasonable doubt that defendant did this, your verdict should be "not guilty" as to each of the counts. The defendant has testified in his own behalf, and you should give to his testimony such weight as you think it is fairly entitled to. You will also, in arriving at a verdict, consider all of the other evidence in the case, and give to the testimony tending to show that at the time in question other and third parties had access to the postoffice at Los Angeles such weight as you think it should receive.

CARRIE JONES v. THE UNITED STATES.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 16, 1888.

1. CLAIM TO A PATENT FOR LAND.—The word "claim," as used in the act of 1887 (24 Stats. 505), giving this court jurisdiction to hear and determine certain claims against the United States, includes a claim by a purchaser or his assignee of timber land under the act of 1878 (20 Stats. 89), to have a patent issue for the same.

Before DEADY, District Judge.

Mr. W. Scott Beebe and Mr. James K. Kelly, for the plaintiff.

Mr. Lewis L. McArthur, for the defendant.

DEADY, J. This suit is brought under the act of March 3, 1887 (24 Stats. 505), entitled, "An act to provide for the bringing of suits against the government of the United States," to compel the issue of a patent to the southeast quarter of section 30, in township 7 north, of range 3 west, of the Wallamet meridian.

It is alleged in the petition that the petitioner resides in Multnomah County, Oregon, and that the land in question is situated in Columbia County, and is of a value not less than \$1,000, nor more than \$10,000; that prior to June 21, 1883, said land was surveyed and subject to entry and purchase under the act of June 3, 1878, for the sale of timber lands in Oregon and other Pacific states (20 Stats. 89), "and was not fit for agriculture, but was chiefly valuable for the timber thereon;" that on said June 21st, one John R. Frierson, having complied with the requirements of said act, and the regulations concerning the acquisition of land thereunder, "so as to entitle himself to pay for the same, and claim a patent therefor from the United States, did on said day, at the United States land office in Oregon City, Oregon, purchase said land from the defendant, and did then and there pay to the receiver of said land office the price thereof, to wit, the sum of \$400, or \$2.50 per acre; and that the receiver gave said Frierson "a certificate or receipt" for said money as "being in full" for said land.

That on June 26, 1883, said Frierson, for a valuable consideration, sold, assigned, and transferred said certificate and receipt, and all his right, title, and interest therein, in and to said property, to the petitioner, and on the same day, in consideration of such sale, said Frierson executed and delivered to the petitioner a good and sufficient deed, with warranty of said land; that the defendant has kept and retained said \$400, and its servants, whose duty it is to execute and deliver the patent for said land, refuse to do so, and deny the right of the peti-

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tioner to have the same, or to any interest in said land, whereby her title thereto is clouded, and the full enjoyment of the property prevented.

The prayer of the petition is that the court will decree that a patent for said land issue to said Frierson, and that all his interest and estate therein by virtue of said sale and patent inure to the petitioner, according to the conveyance to her by said Frierson.

Due service of the petition was made on the district attorney and the attorney-general, as provided in section 6 of the act of 1887, and thereupon the district attorney appeared for the defendant, and demurred to the petition.

Several causes of demurrer are stated, but they are all in effect a denial that the case or the claim of the petitioner is within the purview of the act of 1887; and on the argument of the same, the point was made and relied on, that the "claim" against the United States, of which the act gives this court "jurisdiction to hear and determine," is one for money only.

And, first, the act of 1878 (sec. 1) provides that the surveyed public lands in Oregon and other Pacific states, with certain exceptions not necessary now to mention, "valuable chiefly for timber, but not fit for cultivation, . . . may be sold to citizens of the United States, . . . in quantities not exceeding 160 acres to any one person, . . . at the minimum price of \$2.50 per acre;" that (sec. 2) any person desiring to avail himself of the provisions of the act "shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the general land office, designating by legal subdivisions the particular tract of land he desires to purchase," and setting forth therein the other particulars concerning the character of the land and the purpose of the applicant in acquiring the same, necessary to bring the application within the statute, "which statement must be verified by the oath of the applicant." If such oath is false the affiant is liable to punishment for perjury, "and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of a *bona fide* purchaser, shall be null and void."

The act further provides (sec. 3) that notice of the application shall be given for sixty days, when, if no adverse claim is filed, "the applicant shall furnish to the register of the land office satisfactory evidence" of the publication of the notice and the character and condition of the land; when, on payment of "the purchase money," he "may be permitted to enter" the same; "and on the transmission to the general land office of the papers and the testimony in the case, a patent shall issue thereon."

But any person having a valid claim to any portion of such land "may object in writing to the issuance of a patent" thereto, which objection shall be heard and "determined by the officers of the land office, subject to appeal as in other land cases."

An applicant for land under this act becomes the purchaser thereof, when he makes the prescribed proof to the *satisfaction* of the register, and pays the prescribed price therefor. When the certificate of purchase is issued to the applicant the land described therein becomes his property. The bare legal title is all that remains in the vendor in trust for the vendee; and if it was the case of a private person, a court of equity would compel him to perform his part of the contract, by executing and delivering to the vendee the proper conveyance thereof.

If it is claimed that the certificate was fraudulently or illegally obtained, the land department cannot arbitrarily, or at all, cancel the same or set it aside. The certificate, and the right of the purchaser thereunder, is property, of which he cannot be deprived without due process of law. And mere fiat law, by whomsoever pronounced, can have no such effect. Redress must be had in the courts where such matters are properly cognizable, and where they may be heard and determined according to the law of the land—the law applicable to the rights and obligations of private persons under like circumstances. (*Smith v. Ewing*, 11 Sawy. 56.)

On the facts stated in the complaint, Frierson was the lawful purchaser of the premises from the United States, and is entitled to a patent therefor, and the petitioner has succeeded to all his rights.

This being so, does the act of 1887, permitting the United

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States to be sued in this court on "all claims founded" as therein specified, include this claim or case?

The act provides (sec. 1) that "the court of claims shall have jurisdiction to hear and determine . . . all claims founded on the constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable," with certain exceptions not material here to state. The act (sec. 2) also gives the district and circuit courts of the United States concurrent jurisdiction with the court of claims in all such cases; *provided*, in case of the former, "the amount of the claim" does not exceed \$1,000, and in case of the latter, exceeds that sum and does not exceed \$10,000.

A suit under the act (sec. 5) is commenced by filing a verified petition with the clerk of the proper court in the district where the plaintiff resides. "The petition must set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other *thing* claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law," and a copy of the petition must be served on the district attorney and another mailed to the attorney-general of the United States.

This act should not be strictly construed. It is both beneficent and remedial in its character. In the progress of society from barbarism to civilization, the redress of wrongs and the enforcement of rights by the prescribed methods and measures of the law is an important element, and in the end a prime result. Then the administration of justice not only includes redress against private persons, but by the individual against society—the one against the many. Then, under some proper prudential restraints as to costs and the like, every citizen of the republic who has a claim against the government, instead of

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being compelled to seek relief from year to year from a distant, indifferent, overgrown, and overburdened Congress, or department, will be allowed to seek redress in the ordinary courts of the country in the district where he resides.

The old superstition, born of the tribal and feudal systems, that regarded the right of the subject to call the chief or sovereign to answer and do him right in a court of justice, as incompatible with the dignity of the ruler, has no proper place in either the form or idea of our government, and should not be allowed to come between the citizen and his right to redress against the same. (See Mr. Justice Miller in *United States v. Lee*, 106 U. S. 204.)

The organization of the court of claims, at Washington, in 1885 (10 Stats. 612), was a signal movement in this direction.

By this act that court was given jurisdiction to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."

Thereafter, from time to time, jurisdiction was given the court over particular cases; but the general jurisdiction remained unchanged, until the passage of the act of 1887, which materially enlarges it.

The establishment of a court of claims at Washington, although a long step in advance in the administration of justice between the United States and the people thereof, fell far short of what was necessary to that end. In *Bonner v. United States*, 9 Wall. 156, the supreme court held that the court of claims had no jurisdiction of a suit founded on equitable considerations merely.

This is remedied by the act of 1887, which, in effect, authorized a suit to be maintained against the United States, either at law, in equity, or admiralty.

But the great advance in the act of 1887 is the provision allowing the person entitled to sue thereunder, in case his claim does not exceed \$10,000 in value, to bring his suit in the national court for the district in which he resides.

In a country covering so large an area as the United States,

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in the great majority of cases, it amounts to a denial of justice, to require a suitor to bring his suit in a court so far removed from his residence and resources as the capital of the nation. In the court of his locality, he can conduct his case with much less expense, with the advice and aid of attorneys of the vicinage, who he knows and trusts, and who appreciate him and his cause, and in a tribunal imbued with the local knowledge, often so essential to a correct understanding and determination of a legal controversy.

Considering, for these reasons, that the act conferring jurisdiction on this court to hear and determine "all claims . . . founded on any contract . . . with the government of the United States," is a highly remedial and beneficent one, in its general purpose and scope, I proceed to consider whether it includes such a "claim" or cause of suit against the United States, as the petitioner is shown to have.

On behalf of the defendant, it is insisted that the word "claim," as used in this act, means a money demand, and no other—a claim on which a judgment or decree can be given for money or damages payable in money.

It may be admitted that the term is more often used in this sense than any other, simply because the great majority of claims which arise out of the intercourse and business of the country are in fact pecuniary ones. But the general and natural sense of the term is not thus limited. (*Gray v. Palmer*, 1 Cal. 636.) One may have a "claim" upon or against another for a chattel or land, as well as money or damages.

In *Stowel v. Lord Zouch*, Plow. 359, a claim is defined, as "a challenge by a man of the propriety or ownership of a thing which he has not in possession, but which is wrongfully detained from him." And this definition is adopted by Bouvier. (*Verbum*, Claim.)

In *Prigg v. Pennsylvania*, 16 Peters, 615, the term is defined thus: "It is, in a just and judicial sense, a demand of some matter as of right made by one person on another, to do or forbear to do some act or thing as a matter of duty."

Worcester defines it as follows: "A demand as of right. A challenge of ownership. To lay claim to anything."

In none of these definitions is the meaning of the word limited to mere money demands. And any of them is broad enough to include any demand or right which may be the subject of legal or equitable cognizance in a court of justice. As was said by the supreme court in *Prigg v. Pennsylvania*, *supra*, it includes a demand made of right by one person on another *to do some act*, as a matter of duty. And that is this case exactly. The petitioner, as a matter of right, demands that the defendant, as a matter of duty or legal obligation, comply with its contract under the law under which this land was sold to her assignor, Frierson, and issue a patent for the same.

This is her claim against the United States. It arises on a contract with the government thereof—the contract of sale of June 21, 1883—and in its nature is enforceable by a suit in equity in this court for a specific performance of the same. And this brings the petitioner within the act of 1887, which gives her the right to sue the United States on any claim arising on contract, by a suit in equity, as “if the United States were suable,” which must mean, as if the United States was a private person.

But section 5 of the act shows affirmatively that the right of action or suit given by it is not confined to money claims or demands, but includes “any other thing claimed.” While I am not prepared to say that a claim or right to have a patent issue to a tract of land is a claim or right to a “thing,” because the same is not *in esse*, but only *in posse*; yet the use of the word in this connection plainly shows that Congress did not understand that it was legislating about claims for money only; and that a party having a claim founded upon any law of Congress or contract with the government of the United States, to a chattel or land in the possession of the government thereof, is within the statute.

In my judgment, any person who has a claim against the United States, founded on a contract with the government thereof, on which an action at law or a suit in equity or admiralty might be maintained against a private person, is within the purview of the statute, and may proceed thereunder for the relief to which he is entitled, be it money, damages, possession

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of chattels or land, or a specific performance of a contract in relation thereto.

This, so far as I know, is the first case under this statute, and as it is understood that there are a number of like cases in this district, it is desirable that the construction of the statute should be settled by the supreme court at an early day.

It is not likely that patents are withheld by the land department in these cases without some cause which is thought sufficient to overcome the apparent right of the purchaser. But the right of the purchaser cannot be disposed of in this one-sided, arbitrary way. If the United States will not bring a suit to cancel and set aside the sale to the petitioner's assignor, on the alleged invalidity thereof, it may in this suit, by the petitioner for the patent, set up the same as a defense thereto, and have the question lawfully decided.

The demurrer to the petition is overruled.

THE UNITED STATES v. CLAPOX AND DICK.

DISTRICT COURT, DISTRICT OF OREGON.

JULY 18, 1888.

1. **UMATILLA INDIANS—RULES FOR THE GOVERNMENT OF.**—The President is authorized by the treaty of June 9, 1855 (12 Stat. 948), and the Revised Statutes (secs. 441, 462, 465), to make rules for the government of the Indians on the Umatilla reservation, including the establishment of an Indian court and police, and the definition of "Indian offenses," and the measure of punishment therefor.
2. **MISDEMEANOR INCLUDES ADULTERY.**—The term "misdemeanor," as used in number 9 of the rules promulgated by the secretary of the interior on December 2, 1882, for the government of the Indians on the Umatilla and other reservations, includes "adultery."
3. **CRIME AGAINST THE UNITED STATES—SECTION 5401 OF THE REVISED STATUTES.**—An Indian woman arrested by the Indian police on the Umatilla reservation on a charge of adultery committed thereon, was committed to the Indian jail for trial before the "court of Indian offenses," and while so committed was rescued and set at liberty by the defendants. *Held*, that they thereby committed the crime of rescue, as defined by section 5401 of the Revised Statutes, by forcibly setting a person at liberty who was committed for "a crime against the United States."

Before DEADY, District Judge.

Mr. Lewis M. McArthur, for the plaintiff.

Mr. John J. Balleray, for the defendants.

DEADY, J. The defendants are accused by this information of a violation of section 5401 of the Revised Statutes, which provides: "Every person who, by force, sets at liberty or rescues any person who, before conviction, stands committed for any capital crime against the United States, or who, by force, sets at liberty or rescues any person committed for or convicted of any offense other than capital, shall be fined not more than five hundred dollars and imprisoned not more than one year."

It is alleged in the information, that on March 27, 1888, the defendants were Indians residing on the Umatilla Indian reservation, and under the charge of a United States Indian agent; that one Minnie was then an Indian woman, married to an Indian, both of whom then resided on said reservation and were under the charge of said agent; that prior to said date the secretary of the interior, under the authority and by the direction of the President, promulgated certain rules providing for a "court of Indian offenses" and an Indian police force on said reservation, and caused to be erected thereon a jail for the safe-keeping of such persons as might be committed thereto by said court, either for examination or punishment; that no written warrants are issued by said court, and no written record is kept of its findings or judgments; that under the rules establishing said court and police, and the direction of said agent, the officers of said police force had then and there the authority to arrest any Indian whom they might have cause to believe had "committed a crime or an Indian offense" on said reservation and commit him to jail for examination or trial before said court. On March 27, 1888, said Minnie was arrested on said reservation by said police force for the "offense of living and cohabiting" thereon with an Indian other than her husband, and placed in said jail to await her trial for said offense before said court, and that said defendants did then and there "unlawfully, and with force and arms, break open the said jail, enter the same, rescue and set at liberty" said Minnie contrary to the statute, etc.

The defendants demur to the information, for that it does not state facts sufficient to constitute a crime.

Numbers 4, 5, 6, 7, and 8 of said rules prescribed the punishment for certain acts called therein "Indian offenses," such as

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the "sun," the "scalp," and the "war dance," polygamy, "the usual practices of so-called 'medicine men,'" the destruction or theft of Indian property, and buying or selling Indian women for the purpose of cohabitation. In addition to these, rule 9 provides that said court shall have "jurisdiction of *misdemeanors* committed by Indians belonging to the reservation."

On the argument of the demurrer, counsel for the defendants contended that the alleged rescue is not within the purview of the statute, because, (1) the act for which Minnie was committed is not a crime "against the United States," but only a violation of an Indian police regulation; and (2) adultery is not a "misdemeanor" at common law, and therefore the court of Indian offenses has no jurisdiction in the premises, and the arrest of Minnie was illegal and void.

It is also doubted, whether the interior department has authority to define "Indian offenses" or establish courts for the punishment of Indian offenders, as set forth in said rules.

And first, as to the authority of the department in the premises.

By article 8 of the treaty of June 9, 1855 (12 Stats. 948), between the United States and certain tribes and bands of Indians of Eastern Oregon and Washington, of which the Umatilla Indians are one, it is provided: "The confederate bands acknowledge their dependence on the government of the United States, . . . and engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians."

The Revised Statutes provide, section 441: "The secretary of the interior is charged with the supervision of the public business relating to the . . . Indians." Sec. 462. "The commissioner of Indian affairs shall, under the direction of the secretary of the interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations." Sec. 465. "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."

By this treaty the Umatilla Indians engaged to submit to

any rule that might be prescribed by the United States for their government. This obviously includes the power to organize and maintain this Indian court and police, and to specify the acts or conduct, concerning which it shall have jurisdiction. This treaty is an "act" or law "relating to Indian affairs" — the affairs of these Indians; and by said section 465 the power to prescribe a rule for carrying the same into effect is given to the President, who has exercised the same in this case through the proper instrumentality — the secretary of the interior.

Then there is the general power given by said sections 441 and 462 to the President, acting through the secretary of the interior and the commissioner of Indian affairs, to make regulations for the "management of all Indian affairs and of all matters arising out of the Indian relations."

These "courts of Indian offenses" are not the constitutional courts provided for in section 1 of article 3 of the constitution, which Congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes, to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there under the charge of an agent for the purpose of acquiring the habits, ideas, and aspirations, which distinguish the civilized from the uncivilized man.

As was said by the supreme court in *United States v. Kagama*, 118 U. S. 383: "These Indian tribes are the wards of the nation; they are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection."

There is no doubt of the power of the United States to make these rules, nor that the President is authorized by Congress to exercise the same. It is admitted that adultery was not a crime at common law, except in the time of the commonwealth, when it was punished with death. (4 Blackst. 64; 1 Bishop on Criminal Law, sec. 39.) Blackstone says: "At the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into

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a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigor." And this offense "has ever since been left to the feeble coercion of the spiritual court, according to the rules of the canon law—a law which has treated the offense of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity, owing, perhaps, to the constrained celibacy of its first compilers."

In this country, where there is neither an established religion nor ecclesiastical courts, the offense is only punishable in the common-law courts, when so provided by statute.

A misdemeanor is defined to be "any crime or indictable offense not amounting to felony." (Rap. & Law, Dict. Misdemeanor.) Blackstone says (4 book, 5): "A crime or misdemeanor is an act committed or omitted, in violation of public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors which, properly speaking, are synonymous terms, though in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only."

But the term is sometimes, and not seldom used, in and out of statutes, to denote a mere wrong not punishable as a crime. In *Rex v. Wilkes*, 4 Burr. 2540, the term as used in 4 and 5 W. & M. ch. 18, in relation to outlawries, was held not to include the case of a conviction for a libel, but was confined to trespass and other civil cases. The definition given in Worcester is: "An offense; ill-behavior; evil conduct; misconduct; fault."

Adultery, though not punishable by the English common law, was defined and punishable by the English ecclesiastical or canon law. And this latter was in a sense a part of the common law of England—the law of the land. The common law brought to this country by the American colonists included this crime of adultery as defined by the canon law. But there being no ecclesiastical courts in this country, some of the colonies held that the offense was cognizable in the common-law courts, and others made it so by legislation. (2 Whart. Crim. Law, secs. 1717–1720.)

Adultery is a crime by the statute of this state, though a prosecution therefor can only be commenced on the complaint of the injured party. In legal parlance, the act for which Minnie was committed is in this state, and the United States generally, a crime or misdemeanor. In this case, the term "misdemeanor" is used in a series of rules promulgated by the department of the interior for the improvement of the morals of the Indians on this reservation. In them, after enumerating certain acts and conduct peculiar to the Indian in his savage state, including "plural marriages," it is provided that the court of Indian offenses "shall also have jurisdiction of *misdemeanors* committed by the Indians belonging to the reservation." It is altogether in keeping with the general purpose and spirit of these rules that adultery should be prohibited and punished by them, as well as the acts and conduct specifically mentioned therein. In my judgment the term "misdemeanor," as used in the ninth rule, includes and was intended to include the act of adultery.

And lastly, was Minnie committed for a crime against the United States? The answer to this question is not far to seek. A crime is said to be committed against a state or sovereign when the act which constitutes it is a violation of a penal law of such state or sovereign. In this case the United States, by virtue of its power and authority in the premises, has established a rule, which is in effect a law prohibiting the commission of adultery by an Indian, on the Umatilla reservation, and providing for the arrest, trial, and punishment of any Indian guilty of a violation of the same. Minnie was committed for a violation of this law, and was therefore committed for a crime against the law-maker—the United States.

The place or manner of her commitment is immaterial. She might have been committed to the custody of the police officer, if thought necessary or convenient, or any house or enclosure provided for the purpose. Nor need the process have been in writing. From this Indian court and police in this their first effort in the administration of justice, written process and proceedings could not have been expected.

The old knickerbocker, Wouter van Twiller, when exercising the office of magistrate, paid no heed to parchment, but deliv-

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ered to the constable, as the symbol of authority, his well-known jack-knife and tobacco box, armed with which the Dogberry of New Amsterdam might safely "comprehend all vagrom men."

But pleasantry aside, and in conclusion: the act with which these defendants are charged is in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudible effort to accustom and educate these Indians in the habit and knowledge of self-government. It is therefore appropriate and needful that the power and name of the government of the United States should be invoked to restrain and punish them. The case falls within the letter of the statute (sec. 5411, Rev. Stats.), providing for the punishment of persons who are guilty of rescuing any one committed for an offense against the United States, and I see no reason why it should be construed out of it, or the statute held inapplicable to it.

The demurrer is overruled.

DENTON v. INTERNATIONAL COMPANY OF MEXICO.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

JULY 30, 1888.

1. COURTS—FEDERAL—CIRCUIT—JURISDICTION—CITIZENSHIP—CORPORATIONS.—

Under the act of Congress of March 3, 1887, providing that the United States circuit courts shall have original cognizance of a controversy between citizens of a state and foreign states, citizens, or subjects, but that no civil suit shall be brought before such courts except in the district whereof the defendant is an inhabitant, a citizen of Mexico cannot sue a Connecticut corporation in the United States circuit court for the southern district of California, although the corporation has an office and managing agent in that district.

Before Ross, District Judge.

At law. On motion to quash service of summons, and on demurrer to defendant's preliminary answer in the nature of a plea in abatement.

Mr. Stephen M. White, Mr. George J. Denis, and Mr. Max Loewenthal, for plaintiff, cited *Harold v. Mining Company*, 33 Fed. Rep. 529.

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Mr. George Fuller, for defendant.

Defendant is an inhabitant of the state of Connecticut, and not of the state of California. (*Railroad Company v. Koontz*, 104 U. S. 5; *St. Clair v. Cox*, 106 U. S. 350; *Railroad Company v. Alabama*, 107 U. S. 581; *Insurance Company v. Woodworth*, 111 U. S. 138; *United States v. Telephone Company*, 29 Fed. Rep. 17.) Plaintiff is a citizen of a foreign state, and is not a citizen of a state, in the sense of which the words are used in the constitution and the judiciary acts. Such citizen of a state must be a citizen of the United States. (*Scott v. Sandford*, 19 How. 393.) A citizen of a state is not a citizen of the United States unless he has the qualifications of the latter by birth or naturalization. (*United States v. Cruikshank*, 92 U. S. 542; *Railroad Company v. Koontz*, 104 U. S. 12.) And even a citizen of the United States, who is a citizen of the District of Columbia (*Hepburn v. Ellzey*, 2 Cranch, 445; *Barney v. Baltimore City*, 6 Wall. 280), or of a territory of the United States (*New Orleans v. Winter*, 1 Wheat. 91), is not a citizen of a state. That the words "citizens of different states," in the proviso relating to the district in which suit may be brought, at the end of section 1 of the act of March 3, 1887, do not comprehend "foreign citizens" (or citizens of "foreign states"), is apparent from the use of both terms in the previous part of the section, which declares in what cases the circuit courts shall have jurisdiction.

ROSS, J. This action was commenced in this court. It was brought to recover of defendant a large sum of money, in amount exceeding one million of dollars, for services alleged to have been rendered, and for maps and data alleged to have been furnished, by plaintiff to an alleged Mexican corporation, styled "Luis Huller & Co.," in connection with certain lands in the republic of Mexico, payment for which it is charged was assumed by the defendant. In the complaint it is averred that the plaintiff is a citizen of the republic of Mexico, and a resident of the county of San Diego, state of California; that the defendant is a corporation duly created by the laws of the state of Connecticut; that under and by virtue of its charter it has the power

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and capacity to buy, receive, hold, and sell lands in any state of the United States, and in any and all parts of the republic of Mexico; and to do any and all acts, and to make any and all contracts, relating or incident to the purchase, sale, or holding of such lands; that defendant has ever since its creation carried on business by virtue and under the authority of and in accordance with its charter; that its principal place of business is in the city of Hartford, state of Connecticut; and that it is "doing business in the state of California, and has an office and managing agent in said state of California, within the county of San Diego." The summons issued in the action was served by the marshal of the district, as appears from the returns indorsed thereon, upon one Charles Scofield, "managing agent of defendant in San Diego County." The defendant has appeared specially and only for the purpose of objecting to any jurisdiction of this court over it; and has, among other things, pleaded that it is a foreign corporation, and that at the time of the commencement of this action, and at the time of the attempted service of process upon it, it had no place of business or agent or officer in this state, or any person authorized to receive service of legal process for it, and that Charles Scofield at the time of service upon him was not, and never was, a managing or other agent or officer of defendant within this state.

Without reference to the question of the sufficiency of the plea as set up in the preliminary answer, I think it sufficiently appears from the complaint itself that this court has no jurisdiction of the defendant in the action. By the act of Congress approved March 3, 1887, it is provided:—

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority; or in which controversy the United States are plaintiffs or petitioner; or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and

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costs, the sum or value aforesaid; or a controversy between citizens of the same state claiming lands under grants of different states; or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. . . . But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. . . .” (24 U. S. Stats. 553.)

So far as this section relates to the district in which a civil suit in a circuit or district court may be originally brought, its plain meaning, as held by Mr. Justice FIELD, in *Wilson v. Telegraph Company*, 34 Fed. Rep. 561, is this:—

“That such suit, where the jurisdiction is founded upon any of the causes mentioned in the section except the citizenship of the parties in different states, must be brought in the district of which the defendant is an inhabitant. But where such jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.”

The present is not a suit between citizens of different states, for the plaintiff is in the complaint alleged to be a citizen of the republic of Mexico, and the defendant to be a citizen of the state of Connecticut. It is therefore a suit between an alien and a citizen of a state, and, as has been seen, can only be brought in the district of which the defendant is an inhabitant. That district, according to the averments of the complaint, is not the southern district of California, but the district of Connecticut.

The fact alleged, that the defendant is carrying on its chartered business within the state of California, and has a managing agent within this judicial district, does not constitute it an inhabitant of this district. As both the charter of defendant and the laws of California permit this to be done, defendant may

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undoubtedly be sued in the courts of California. The extension of the operations of the corporation, however, beyond the limits of the state of its creation, does not constitute it an inhabitant of every district in which it may do business. It can have but one residence or habitat, and that is the place where its principal business is done. "A corporation," said the supreme court in *Railroad Company v. Koontz*, 104 U. S. 12, "may for the purpose of suit be said to be born where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights, and having all the powers, its charter confers. It cannot migrate nor change its residence without the consent, expressed or implied, of its state; but it may transact business wherever its charter allows, unless prohibited by local laws." As the complaint itself shows that defendant at the time of the bringing of this action was not an inhabitant of this judicial district, the summons should be quashed, and the action dismissed; and it is so ordered.

UNITED STATES v. BORNEMANN.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JULY 31, 1888.

1. **INDICTMENT — CAPTION — MISRECITAL OF DATE OF FINDING.** — A misrecital in the caption of an indictment of the date of its finding, it reading "1885," for "1888," where from the whole record the error appears to be merely clerical, is not fatal, as the caption is no part of the indictment.
2. **SAME — REVISED STATUTES, UNITED STATES, SECTION 1025.** — Such error also comes within the purview of the Revised Statutes, United States, section 1025, which provides that no indictment shall be deemed insufficient by reason of any defect in matter of form only, which does not tend to prejudice the defendant.

Before SAWYER, Circuit Judge.

At law. Motion to quash indictment.

Mr. Jackson Hatch, United States District Attorney, for the United States.

Mr. S. G. Hilborn, for defendant.

SAWYER, Circuit Judge. The caption of the indictment commences as follows: "At a stated term of the said court, begun and holden at the city and county of San Francisco, within and for the district of California, on the first Monday of February in the year of our Lord one thousand eight hundred and eighty-five," whereas it should have been eighty-eight, the word "five" by a clerical error having been written for the word "eight." The offense charged is alleged, in the body of the indictment, to have been committed on the twenty-first day of August, 1885, after the date when the grand jury is recited in the caption to have been impaneled. For this discrepancy between the caption and the body of the indictment, defendant moves to quash. The indictment is signed by "John T. Carey, United States Attorney," who was such officer at the February term, 1888, but not at the February term, 1885. The indictment is indorsed, "A true bill. ALEXANDER BOYD, Foreman;" and it is also indorsed by the clerk of the court, "Presented and filed in open court, this first day of May, A. D. 1888. L. S. B. SAWYER, Clerk." The minutes, journals, and other records of the court show, that the grand jury was in fact impaneled for the February term, 1888, of which Alexander Boyd was foreman, and that a bill for the offense charged in said indictment was duly presented and filed on the day indicated by the filing of the bill, while there was no such proceeding indicated anywhere in the records of the court for the February term, 1885. Thus all the records, except the date in the caption, show that the indictment must have been, and, in fact, it was found, and presented by the grand jury duly impaneled at the February term, 1888, and the defendant's attorney was present when the jury was impaneled, and took part in their examination.

The question is, whether the clerical error, apparent from the whole record, of writing the word "five," for the word "eight," in the caption, vitiates the indictment. In the opinion of the court it does not. Under the practice in England, to which the criminal practice in the national courts generally, and substantially conforms, in the language of Mr. Archbold, "the caption

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is no part of the indictment. It is merely the style of the court where the indictment was preferred, which is prefixed as a kind of preamble to the indictment upon the record, when the record is made up, or when it is returned on *certiorari*." (Archb. Crim. Pl. 27.) He then gives the form of the caption, which is somewhat more full than that of the indictment in this case. Mr. Bishop, after stating that the practice in some of the states is different from that of England, says: "It follows from what has been said, that though the caption is a part of the record, it is not of the indictment, and it may be amended to the same extent as the record in any other place." (Bishop on Criminal Procedure, sec. 661.) And he adds: "The commencement, whether in England or this country, is not a part of the indictment. It is a preliminary statement, liable to be corrected, like an indorsement on the indictment by the clerk of the court, or a docket entry, before it becomes of record, or afterwards, in the same manner as any other part of the record. Such is pretty plainly the true view, though the authorities on the question are not entirely uniform and distinct." (Bishop on Criminal Procedure, sec. 622.) So that neither what is technically called the "caption" nor the "commencement" is a part of the indictment.

That clerical errors of the kind apparent on the face of the whole record do not vitiate the indictment is determined in *Commonwealth v. Hines*, 101 Mass. 33; *Commonwealth v. Stone*, 3 Gray, 453; *Commonwealth v. Mullen*, 13 Allen, 551; *United States v. Thompson*, 6 McLean, 56. In the case of *State v. Davidson*, 36 Tex. 325, the facts are not fully stated. But if in point, it is against the current of authorities where the matter does not depend upon statutes. In *United States v. McNeal*, 1 Gall. 387, the error was in the body of the indictment. So in *State v. Litch*, 33 Vt. 67, the error was in the body of the indictment charging the offense to have been committed at an impossible time. These cases do not affect the question. We are satisfied that the error in the caption, where the whole record clearly shows it to be a mere clerical error, is not fatal.

We also think the case is within the provisions of section 1025, Revised Statutes, which are that "no indictment found and presented by a grand jury in any district or circuit or other

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court of the United States shall be deemed insufficient, nor shall trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." If not within this statute it is difficult to perceive what useful purpose this section can serve. There is no defect or imperfection that can, possibly, tend to the prejudice of the defendant. The motion to quash the indictment is denied.

THE UNITED STATES v. JOHN WAINOR.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 4, 1888.

1. **ATTEMPTING TO VOTE ILLEGALLY.**—Section 5511 of the Revised Statutes, for the prevention and punishment of corruption and misconduct at a congressional election, does not include an "attempt" to do or commit any of the acts therein specified and prohibited, except that of voting in the name of another person, and the act of aiding, counseling, procuring, or advising any person, voter, or officer, to do or omit to do any act, the commission or omission of which is thereby made a crime, and therefore an indictment will not lie thereon against one for attempting to vote at such election a second time.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the plaintiff.*Mr. Robert G. Morrow*, for the defendant.

DEADY, J. The indictment in this case charges that the defendant, on June 4, 1888, at an election then being held in the state of Oregon for a representative in the Congress of the United States, did knowingly "attempt and offer to vote a second time" for such representative, at polling place numbered 1, in South Portland precinct, in the state aforesaid, he having already voted once for such representative at said polling place, on said day.

The defendant demurs to the indictment, for that the facts stated therein do not constitute a crime.

The indictment is found under section 5511 of the Revised Statutes.

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The section is a very long one, over-crowded with particulars. It is a crude, bungling piece of composition, and considering the importance of the subject, shamefully obscure and uncertain. Although intended to punish and prevent bribery and corruption at congressional elections, it does not make the reception of a bribe a crime, and only includes the case of a briber by the obscure indirection of making it a crime to prevent, "by force, threat, intimidation, *bribery*, reward, or offer thereof," any qualified voter "from freely exercising the right of suffrage."

The section contains nine clauses, separated by the conjunction "or" and a semicolon, specifying a great number of acts and omissions relating to elections for representatives in Congress, which are thereby made criminal and punishable by fine and imprisonment.

The first four relate to unlawful voting by any person—as voting or attempting to vote in the name of another person, voting more than once, or at a place where the party is not entitled to vote, or without having a lawful right to vote, or doing any unlawful act, to secure an opportunity to vote. But nothing is said concerning an attempt to do any of these acts except the first. The next four clauses relate to the preventing of any person "from freely exercising the right of suffrage by force, threats," etc., or compelling, or inducing by any such means any officer of election to act unlawfully, or interfering in any manner with him in the discharge of his duty. The eighth and ninth clauses read as follows: "Or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote; or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so," shall be punished, etc.

The "person" or "officer" who is the subject of these two sentences or clauses is not expressed. But from the nature of the acts prohibited in the first of them—the receiving or refusing a vote illegally—it must be an officer at a congressional election, and in the case of the second one it may be "any person" who gives the "aid, counsel," etc., therein prohibited.

And the "such voter, person, or officer," mentioned in the latter clause, and who may be the object of such "aid, counsel," etc., must be the "qualified voter," the "any person" or "officer of such election," mentioned in the preceding part of the section.

On this analysis of the statute, the eighth and ninth clauses when expressed in full should read: Any officer at a congressional election, who "knowingly receives the vote of any person not entitled to vote;" or knowingly "refuses to receive the vote of any person entitled to vote," or "any person" who "aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or *attempt to do so*," shall be punished, etc.

The use of this form of the verb "attempt," in this connection, is a blunder. It should have been in the form of the third person singular—attempts—or it might have been in the future tense—shall attempt—so as to read: Any person who aids, counsels, etc., or "attempts" to aid, counsel, etc., or "shall attempt to aid, counsel, etc. However, the phrase "attempt to do so," or "attempts to do so," cannot be construed to apply to any act other than those mentioned in the clause in which it is contained; and those are "aids, counsels, procures, or advises any such voter, person, or officer" to do or omit to do an act, the commission or omission of which is by the statute made a crime. Disregarding the grammatical error in the use of the word "attempt," in legal effect, the clause reads: "Any person who aids, counsels, procures, or advises, or attempts (or shall attempt), to aid, counsel, advise, or procure any such voter, person, or officer," etc., shall be punished, etc. The act of attempting to vote illegally, except in the case of attempting to vote in the name of another person, appears to have been overlooked in the preparation of the statute, and no provision is made therein for its punishment.

Therefore, the act with which the defendant is charged in the indictment—an attempt to vote illegally, because he had already voted once at said election—is not a legal crime, and the demurrer is well taken.

This is to be regretted. The defendant has incurred the moral

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guilt of attempting to pollute the ballot-box—the sacred depository of the public will—with an illegal vote, and deserves legal punishment therefor.

But the remedy for the omission is with Congress, and not the courts.

If the defendant, in his attempt to vote, did any unlawful act to accomplish his purpose, he may be proceeded against for a violation of the fourth clause of the section, which provides that if any person “does any unlawful act to secure an opportunity to vote for himself, or any other person,” he shall be punished, etc. Thus, if the defendant was sworn, on his offer to vote a second time, and thereupon stated that he had not voted at that election, he would be guilty of an unlawful act—perjury—“to secure an opportunity to vote for himself,” and could be prosecuted therefor.

The demurrer is sustained.

IN RE WO TAI LI ON HABEAS CORPUS.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 16, 1888.

1. **HABEAS CORPUS.**—A Chinese actor claiming the right to enter the United States must produce the certificate required by section 5 of the amended restriction act of 1884.

Before HOFFMAN, District Judge.

Mr. Philip Teare, for petitioner.

Mr. John T. Carey, United States Attorney, and *Mr. Charles L. Weller*, Assistant United States Attorney, on behalf of United States.

HOFFMAN, J. The petitioner claims the right to land in the United States on the ground that she is the wife of a Chinese actor, and therefore does not come within the prohibition of the treaty and of the act of Congress which forbids the coming into the United States of Chinese laborers. By the sixth section of the amended restriction act of 1884, it is provided in substance that “every Chinese person other than a laborer who may be

entitled by said treaty, or this act, to come within the United States, and who may be about to come to the United States, shall obtain the permission of, and be identified as so entitled by the Chinese government, etc. In each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, etc. . . . The certificate provided for in this act, and the identity of the person named therein, shall, before such person goes on board of any vessel to proceed to the United States, be vised by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative, etc.; . . . such certificate vised as aforesaid shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs in the port of the district of the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, *and shall be the sole evidence permissible on the part of the person so producing it; the same to establish a right to entry into the United States.*"

No such certificate has been produced, or was obtained by the petitioner in this case. It is contended on her part that the certificate is declared to be the sole evidence permissible *on the part of the person so producing the same*, and that inasmuch as this person has not produced any certificate, that parol testimony is admissible to show that she does not belong to the prohibited class.

The language of the act is certainly infelicitous, but its meaning is obvious. It is that the certificate is required to be produced by all Chinese persons, other than laborers, claiming the right to enter this country, and such certificate is to be the sole evidence of their right to land. Unless, therefore, the whole section is to be disregarded, and the obvious intention of Congress frustrated, the certificate must in all cases be exacted. To say that because the applicant has utterly neglected to comply with the law, and has produced no certificate, therefore her right to land may be established by other evidence, would be an absurd conclusion, founded upon the mere letter of the statute, and in obvious contravention of its spirit and meaning. The petitioner must be remanded.

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IN RE TOM MUN ON HABEAS CORPUS.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 21, 1888.

1. HABEAS CORPUS. — Petitioner remanded on the ground that he has failed to establish to the satisfaction of the court his right to enter the United States.

Before HOFFMAN, District Judge.

Mr. John T. Carey, U. S. Attorney, for the United States.*Mr. Thos. D. Riordan*, for petitioner.

HOFFMAN, J. The petitioner claims to be entitled to land on the ground commonly known as "previous residence." He adduces the usual proofs tending to show that he left the United States on the 15th of March, 1882. The company's books are produced showing that one Tom Mun paid his dues, and departed on the steamer *Oceanic*, which sailed on that date. Books also are produced from the shoe factory in which he claims to have been employed, which contain his name among those of the employees paid off a few days previous to the date of his alleged departure. He also produces one F. H. Martin who testifies that he was a Chinese collector; that he knew the petitioner at the shoe manufactory mentioned, and he "guesses" he went away in 1878 or 1879, since which time he has not seen him. This discrepancy between the testimony of the petitioner and his only white witness is explained by the attorney for the petitioner by the suggestion that the date fixed by Martin is, "as close as a white man could fix the departure of a Chinaman in whom he had no interest or business connection." This observation may be just, but it is also evident that the witness who made a mistake of three or four years as to the date of the departure may be equally mistaken as to the identity of the person whom he pretends, or perhaps thinks, he saw working in the shoe factory. It unfortunately happens, however, that it appears by the company's book produced by the petitioner, that another Tom Mun, who claimed to be the party mentioned in the Six Company's book, was landed by the court. That entry has been canceled, affording certain proof that it has been used by the first Tom Mun, and successfully. The

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attorney for the petitioner, who was also the attorney of the first Tom Mun, is thus compelled to admit, and even to contend, that the first Tom Mun was landed by means of perjured testimony and false personation; but he insists that the present Tom Mun is the true owner of that name, and that he ought to be landed, notwithstanding the fraud previously practiced upon the court.

The circumstances of this case afford another instance of the perjuries and frauds committed in these cases, and of which the court has unfortunately been too often the dupe. Whether the present applicant is Tom Mun, or whether the real Tom Mun was the man heretofore landed, or whether either of them is the owner of the name, it is impossible to determine. It may be that a third Tom Mun will hereafter present himself, and the court will be asked to believe that the testimony in both these cases is false, and that the true and genuine Tom Mun is Tom Mun number 3, who may hereafter make his appearance. When a Chinaman claims to be landed on the ground of previous residence, the burden of proof is upon him to show to the satisfaction of the court that he was in this country at the date of the treaty, and that he departed before the act of 1882 went into operation. If he fails to do so, he must of course be remanded.

In this case I am unable to reach any satisfactory conclusion as to which of these Tom Muns, if either of them, is the person whose name is entered in the company's book. It is highly probable that somebody of that name did depart for China at the time specified, but whether the present petitioner, or his predecessor of the same name, is the man, depends entirely upon Chinese testimony, which was presented to the court in the first case with as much plausibility as in the present case.

I think that the petitioner has failed to establish his right to land, and must therefore be remanded.

THE NITH—EDWARD J. DE HART ET AL., LIBELLANTS.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 30, 1883.

L. THE TERM "RUSTY" IN BILL OF LADING.—The term "rusty" in a bill of lading is a statement of fact and not an article of the agreement, and is therefore open to explanation or contradiction.

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2. **STOWAGE OF SALT.**—Salt should never be stowed over iron where there is any chance that water may come through from above onto the salt.
3. **CARGO AROUND THE MAINMAST.**—Cargo, and particularly salt, stowed around the mainmast, ought to be dunnaged away from the mast, so that if any water comes through the mast-coat it will not come in contact therewith.
4. **DAMAGES FOR NON-DELIVERY OF GOODS.**—The measure of damages for the non-delivery of goods is their value at the port of destination, with interest on that amount from the time the delivery ought to have been made.
5. **BILL OF LADING—BURDEN OF PROOF.**—The bark Nith received a lot of Swedish iron in bars and bundles at Liverpool for carriage to Portland, and upon its discharge here the iron was found to be badly damaged and corroded with rust from salt water; the master signed a bill of lading for the iron in "good order and condition" with the qualification, "bars and bundles rusty"; and it appearing that Swedish iron, at Liverpool, was generally more or less covered with a light atmospheric rust, which did not affect its commercial value, and that the usage was to insert "rusty" in bills of lading therefor from Liverpool to this port. *Held*, the burden of proof is on the carrier to show that the iron was otherwise affected than by atmospheric rust at the time of its receipt by the vessel.
6. **PERIL OF THE SEA—PROPER SKILL AND DILIGENCE.**—Admitting that the breaking of the mast-coat during a storm in which the decks are flooded, whereby a stream of water goes down the mast into the hold, is a peril of the sea, the exercise of proper skill and diligence would lead to the discovery of the rust, and secure the repair of the same in a less period than twelve or eighteen hours.

BEFORE DEADY, District Judge.

Mr. Edward N. Deady and *Mr. Horace B. Nicholas*, for the libellants.

Mr. C. E. S. Wood, for the defendant.

DEADY, J. The libellants, Edward J. De Hart and William Honeyman, doing business as partners under the firm name and style of Thompson, De Hart & Co., bring this suit against the British bark Nith on a contract of affreightment to recover damages in the sum of \$3,700.17, for a violation thereof.

It is alleged in the libel that in February, 1887, the libellants shipped on the bark, then lying at the port of Liverpool, England, and bound on a voyage to the port of Portland, about 24 tons of Swedish iron and 52 anvils, weighing about 7,017 pounds, in good order and condition, and worth at this port \$3,700.17, upon a contract with the master thereof, that in consideration of certain freight then paid by the libellants, he would deliver said iron and anvils to them at this port in like order and condition, loss and damage from the perils of the sea only excepted; that said iron and anvils were not so delivered, but

by the misconduct of the master and his servants, the same "became wetted and damaged to such an extent as to be a total loss to the libellants," whereby they are damaged in the said sum of \$3,700.17, for which they pray a decree with costs, and the arrest and sale of the vessel to satisfy the same.

On the arrest of the bark, the master, John Adair, filed a claim of ownership on behalf of Bramwell and Gardiner, and the same was delivered to him on the stipulation of John A. Brown and Thomas Hislop in the sum of \$8,000.

In his answer, the master admits the receipt of the iron and anvils on January 20, 1887, at Liverpool, and the contract to carry and deliver the same at this port, and alleges generally that said articles were properly stowed and cared for during the voyage.

As to the iron, he also alleges, (1) that it was damaged by rust when received on the Nith, and that the bill of lading was given therefor accordingly; and (2) that the damage was caused during the voyage by a peril of the sea, to wit, the carrying away of the mainmast-coat on April 20, 1887, "by reason of the heavy rolling and straining of the bark," in a severe storm, whereby "some water was unavoidably precipitated into the hold." As to the anvils, he admits they were "apparently in good condition," but alleges they were so encased as not to be open to inspection; that they were stowed in the hold around the mainmast, and that probably "some of the water that entered the hold" when "the seam of the mainmast-coat was carried away, fell upon or reached said anvils" and caused the rust, if any, which is a peril of the sea. He also alleges that the anvils are only slightly rusty, and that such rust is "the inevitable result" of the "straining of the bark on the voyage," and "the large quantities of water shipped during" the same.

The iron, which is in bundles and bars, when it reached this port was very badly damaged with rust. It is in the condition known to the trade as "froze," that is, stuck or run together. No use can be made of it unless it is rerolled. The anvils are more or less rusty on the face, and cannot be used unless the rust was ground off. Neither is in a merchantable condition, and the carrier is liable for their value at this port, unless they were in the same condition when received, or the injury occurred

during the voyage by a peril of the sea, to which the negligence or misconduct of the owner or his servants did not contribute.

The bill of lading acknowledges that the anvils were "shipped in good order and condition," to be delivered at this port in like order and condition. But the faces of the anvils were covered with canvas. The admission as to their condition is qualified by this circumstance, and if the fact was otherwise, the carrier may show it. The words "in good order and condition" in a bill of lading are like the admission of any other fact in an ordinary receipt for money, open to explanation or contradiction. They do not constitute an agreement, though contained in one. (*The Pacific*, 1 Deady, 21.) The admission establishes the fact, *prima facie*, that the anvils were in good order when shipped, and the burden of proof is on the claimant to show the contrary. The bill of lading for the iron, consisting of 700 bars and 777 bundles of Swedish rolled iron, weighing 24 tons and 908 pounds, admits in the printed formula that it was also "shipped in good order and condition," which admission is qualified by the addition in writing of these words, "bars and bundles rusty."

The Nith is an iron vessel, built at Glasgow in 1860, and was once known as the City of Shanghai. Her length is 212.5 feet, beam 32.3 feet, and depth 21.5 feet. Her registered tonnage is 990 tons, while she will carry 1,400 tons. She is divided into three compartments. The between-decks in the middle compartment is not floored over. Her cargo on this occasion consisted of 1,052 tons of "factory filled" salt in 50 and 100-pound sacks, 100 tons of coke, 2,540 boxes of tin, some crystals of soda, and the iron and anvils in question. She left Liverpool on February 7, 1887, and the voyage occupied 182 days to Astoria, and 191 to Portland. She drew 20 feet aft and 19.8 forward.

The defenses are inconsistent and hypothetical. The iron was damaged when it was shipped, but if it occurred on the voyage it was caused by a peril of the sea; which peril was also the cause of the injury to the anvils, if they were injured.

The disputed questions in the case are: (1) What was the condition of the iron when it was shipped? (2) Was it rusted on the voyage, and if so, from what cause? and (3) What caused the anvils to rust on the voyage?

And first the words in the bill of lading, "bars and bundles rusty," like the words, "in good order and condition," are a mere statement of fact that is open to explanation or contradiction.

The evidence shows that this iron was brought by the steamer *Sleepner* from Gothenberg, Sweden, to Liverpool, and that such iron, owing, I suppose, to the humidity of the climate, is always more or less, and generally more than less, covered with a slight atmospheric rust, and that it is the usage in signing bills of lading at Liverpool for such iron destined to this port, to insert therein the word "rusty." A bundle of five bars taken from a shipment of 520 bundles and bars of Swedish rolled iron, lately brought from Liverpool to this port in the vessel *Roscrana*, was produced in court. It is somewhat affected or colored by this thin atmospheric rust, but yet good merchantable iron. The bill of lading given by the carrier is also produced, which first admits the iron is shipped in good order and condition, and then referring to the whole shipment, the words, in writing, are added, "all more or less rusty."

Under the circumstances, the bill of lading must be taken and construed as meaning nothing more than that the iron was more or less covered with the atmospheric rust, common to Swedish iron in that port, which did not, however, affect its commercial value. Nor does it seem reasonable or probable that a master would sign a clean bill of lading for iron in the condition which this now is, or even a much better condition, only qualified by the addition of the mild and uncertain term "rusty." The most natural thing in the world would have been to write, "Very rusty," "Badly rusted."

So far, then, as the case stands on the bill of lading the proof is that the iron, when shipped, was in the usual condition of Swedish iron at Liverpool, that is, more or less covered or colored with atmospheric rust, which did not diminish its commercial value. The burden of showing that it was otherwise rusted or thereby badly damaged, as alleged by the claimant, now rests on him.

On this point both parties have taken testimony. The claimant has introduced the deposition of the master of the *Nith*, taken here, and those of the ship-keeper, freight clerk, and wharfinger of the *Nith*, and the two stevedores and their foremen, who loaded the vessel, taken at Liverpool. They all state substan-

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tially that the iron, when taken aboard, was badly rusted and corroded, as if it had been wet with sea water. The master adds, that it lay on the quay of the Nith some days before it was shipped, because he refused to receive it on account of its condition, when word came from the shipper, but how or by whom he does not say, that the iron was bought for Portland, and must go forward "rusty or no rusty," and that "they said" that the iron got rusty coming across from Sweden, the steamer having sprung a leak, so he "took the iron and gave them a rusty receipt," and added, "I was quite willing to take it as long as I protected myself."

The ship-keeper only saw a part of the iron, having kept tally for the freight clerk on the quay, where it was delivered, while the latter was at dinner.

The two stevedores, father and son, and their foreman, tell a story about the stowage of the iron that is so flatly contrary to the admitted facts of the case, that they are either mistaken about the vessel they loaded, or intentionally false in a very material matter concerning the same. The stevedores say directly, and the foreman in effect, that the iron was first stowed under the direction of the son on the floor in the wings at the main hatch, who, in doing so, said the iron was so badly rusted that there would be no harm in putting it there and stowing salt immediately on top of it; but the father interfered, saying, this will not do, for when the iron reaches its destination the owner will claim that the salt caused the rust; whereupon the iron was moved to the after-hold and stowed on the floor on either side of the mainmast, and three tiers of crates of earthenware stowed on it. And now, to prevent the salt that was afterwards stowed in front of the iron—not on *top* of it—from coming in contact with it, a bulkhead was made of boards and matting against the ends of the crates to keep the salt from the iron; and as the crates extended forward over the iron, in the language of the witness, "overlapped it," there was a foot of space between the iron and the salt. The witnesses do not say, in so many words, that there was no salt stowed above the iron, but such is the necessary conclusion from what they do say as to how it was stowed and why it was so stowed.

Now the fact is that there were at least eight or ten tiers of fifty and one-hundred-pound sacks of salt stowed over the iron and immediately on top of the crates. And therefore, if this statement is a falsehood, it is a lie with a circumstance. But it goes too far. And whether the witnesses are mistaken in the vessel or have told a falsehood about the stowage of the iron, to give an air of verity to their statements concerning the condition of the same, their testimony is entitled to but little, if any weight.

Considering the relation of the master to the controversy, and the contradictory, reckless, and absurd statements in his testimony generally, he is not entitled to much credit on this point. This leaves the proof of the claimant to rest mainly on the testimony of the freight clerk, wharfinger, and ship-keeper, all persons with an evident bias and sympathy for the vessel in whose employ they appear to have been at the loading of the cargo. Add to this the statement of the mate that the iron was on board the vessel when he joined it, and the surface was rusty, but he could not see it underneath. This implies, probably, that the iron was not then covered with the crates; but the witness does not say so, nor does he say that the iron was anything more than merely "rusty," which is admitted.

Against this testimony the libellants produce the depositions, taken in Liverpool, of the master, stevedore, and porter, the shipping clerk, and warehouseman, and the delivery foreman of the agents at Liverpool of the shippers of the iron at Gothenberg. They say they have had many years' experience in handling Swedish iron, and that this lot passed through their hands in their several capacities on the way from the steamship *Sleipner* to the *Nith*, and that it was in good condition for Swedish iron; that it was not corroded, or scaled, but more or less covered with atmospheric rust, which would rub off with the hand. Both the delivery foreman and the freight clerk say they never heard that the master made any objection to receiving the iron, and the latter says he has shipped thousands of tons of Swedish iron in the same condition and nothing was said about it.

The libellants also produce the deposition, taken at Liverpool, of Emil Bruhn, the chief officer of the steamship *Sleipner*, when the iron was brought from Gothenberg. He says he forwarded

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the iron to the Nith, and that when it left the Sleipner it was in good condition; that it was not damaged in the slightest, and if there was any rust on it it was atmospheric; and that he had been engaged nine years in handling Swedish iron.

On this state of the proof the only reasonable conclusion is that the iron was in good condition when it was received on the Nith, as stated in the bill of lading, barring the atmospheric rust, which did not affect its commercial value. Although the burden of proof is on the claimant to show that the iron was damaged, yet the decided weight of the evidence, considering both the number and credibility of the witnesses, is to the contrary.

The claim that the anvils were not in good condition when received on the Nith is not made out in proof. In fact, there is no evidence worth considering in support of it, and the finding must be, as stated in the bill of lading, that they were in "good condition."

The next question is, what caused the iron and anvils to rust on the voyage, and is the carrier liable for the injury caused thereby?

The evidence introduced on the question includes a protest made by the master of the Nith, the first and second mate and the carpenter, at the British vice-consulate in this city on September 17, 1887, and a report of the port-warden of this district, appointed under the act of June 3, 1859, of a survey of the vessel and cargo made by him at the request of the consignees of the former on September 20, 1887. The protest was introduced by the claimant, subject to the objection of the libellants, and the report was introduced by the latter without objection.

The protest is an *ex parte* statement, not required or authorized by any statute that I am aware of. It is made by the agents of and in the interest of the owners, and on general principles it is not competent evidence for them, though it may be used against them. It purports to be written by a third person, and not one of the "appearers." It is said to be made from the log, but the book is not produced. (1 Greenleaf on Evidence, sec. 495; 1 Wharton on Evidence, sec. 648. See, also, 2 Conkling's Admiralty, 338.) However, on their examination, the master, mate, and carpenter, each swore that the protest was correct, and it will be considered as a part of their testimony.

The report is made pursuant to a statute, by a public officer acting under oath. The survey was made at the request of the consignees of the vessel, and the statute required the warden to keep a record of it, open to the inspection of persons interested in the same, and to furnish a certified copy thereof, under his "hand and seal," to any person requiring it. In my judgment this record, or a copy thereof, is *prima facie* evidence of the pertinent facts contained therein, for or against the parties of this suit. (1 Wharton on Evidence, secs. 640-643.)

The paper introduced is under the hand and seal of the warden, and purports to be a triplicate original. It is neither the record, which the statute requires to be kept in a "book," nor a copy thereof. But the warden, who was called as a witness by the libellant, testified that it was in fact the report of his survey, and it was so accepted by the parties.

There is no conflict in the testimony as to the place and manner of stowing the iron and anvils. The bundles and bars are from eight to fourteen feet long. They were stowed "grating fashion" on the floor of the vessel, properly dunnaged, on either side of the mainmast. The anvils were stowed around the mast on either side of the kelson. On top of these were placed three tiers of earthenware crates, and over all eight or ten tiers of the salt in sacks. Between the mast and this cargo there was a mat and an inch board.

On taking out the cargo it was found that sea water had gone down the mast in such quantity as to wash out or drain away several sacks of salt, leaving a hole around the mast and next to the deck two feet wide on either side. Going down the damp and wet from this inflow spread out through the straw in the crates twelve feet on each side of the mast and as far aft but less forward; but the floor was dry. The straw in many of the crates when discharged was still wet or moist, and in some it was soaked and rotten. It also appears that in a blow off Cape Horn the vessel shipped considerable water, and that during the night of April 20, 1887, a rent was made by some means in the mast-coat, down which the sea water poured when the decks were flooded for a number of hours.

Undoubtedly this was the way the salt around the mast was filled with water and sluiced out into the crates below, where

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the brine thus formed gradually found its way along and through the straw and ware in the crates downward and outward to the iron and anvils, where it was arrested by its affinity for the metal, and converted into dry rust.

The protest, evidently written up in high colors for effect on shore, is filled with florid accounts of almost continual high winds and rough seas, from the river La Plata to the Pacific Ocean, during a period of six weeks, in which the vessel is represented as straining and laboring as if on the verge of shipwreck. The casualties, however, are not material, except the breaking of the mast-coat, which the claimant attributes to the straining of the vessel in the heavy seas and high winds. But this is absurd. An iron vessel does not strain or work as a wooden one may. If it did, the rivets which hold the plates together would soon be cut off and the vessel go to pieces or to the bottom. Neither did the rolling and laboring of the vessel cause the iron mainmast to spring or work so as to tear the coat. The mast is wedged tight in the timbers where it passes through between the decks, and has four inches play where it passes through the main deck. If the coat was broken by the working of the mast, it would most naturally be torn from its fastening on the mast or the deck. But the evidence is that it was not so torn, but the seam which runs up from the deck to the mast, and on the after side of the latter, was ripped so that a hand could be thrust in the opening. How it took place does not appear, but it probably was caused by the water carrying something that got adrift against it, or it may be the direct result of a blow from a volume of water thrown on the deck by the shipping of a sea. However, this latter supposition is not very probable, unless the coat was rotten, to which effect there is some evidence. But however this is, it may be admitted that the ripping of the coat, whatever caused it, was a peril of the sea, within the exception of the bill of lading. And then the question arises, did the misconduct or negligence of the carrier contribute to the injury resulting therefrom to the cargo? or in other words, would the exercise of proper skill and diligence in the stowage of the cargo, or the repair of the coat, have prevented this injury, notwithstanding the accident?

From the evidence it appears that the break in the mast-coat occurred some time in the night. The mate says it was repaired next morning. The carpenter says: "It was my place to go around in the morning and evening and sound the ship; the mast-coat is near the pumps, and that is where I noticed it when I sounded the ship in the morning; the seam was between five and six inches on the aft part of the mast, and the hole was in the seam." He adds that it was all right when he sounded the ship in the evening, and in the morning he discovered the break and repaired it immediately by tacking a piece of lead over it.

During this period it appears that the deck was flooded with water, which may have been running down this hole for at least twelve hours. This, in my judgment, was negligence. According to the evidence of the claimant, the breaking of the mast-coat may be expected under such circumstances, and particularly if the material is rotten or decayed, as this probably was. Under the circumstances, it should have been discovered before it was. But in the protest, which is signed and sworn to by these witnesses, and which they now swear is correct, it is stated: "At four, P. M. (April 20th), discovered seam of mainmast-coat gone, caused by the heavy rolling and straining; a large quantity of water must have gone down into the hold."

And the master who made this protest, and thereby declared, what is apparent, that "a large quantity of water *must* have gone down into the hold" in this way, in his answer to the libel, as well as his deposition, gingerly admits that "*some* water was precipitated into the hold" by this means, but "is almost certain" that it did not reach the iron. The protest also states that on April 12th, "sounded pumps and found eight inches of water in the forward hold and six and one half in main hold;" while the carpenter in his deposition says: "We had no occasion to pump her (the Nith). She made no water. An inch or an inch and a half is what we have taken out of her."

But even admitting that the water going into the hold through this rent in the mast-coat is a peril of the sea that could not by ordinary skill and diligence have been prevented or remedied sooner than it was, still, in my judgment, the carrier is liable to the libellants for the injury thereby done to the iron, because it

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was improperly stowed. There are some things that one person of common sense and ordinary intelligence can understand and have an opinion about as well as another, be he ever so expert; and in my judgment one of them is, that salt and iron, unless it may be pig, should not be stowed contiguous to one another, and particularly, that the former should not be stowed over the latter, when there is any chance for water or drainage to come through or from the salt to the iron.

In Stevens on Stowage, an English work (1869) of admitted authority, it is said (p. 478, sec. 849): "Salt, from its moisture, should be divided by bulkheads from other goods; even crates should not come in contact, for the straw will rot and breakage ensue. . . . The evaporation from salt, which settles against the under parts of the decks, will, when it falls, prove very injurious to some descriptions of perishable goods below, iron and machinery especially."

But it is said that this was dry salt; and so I suppose is the salt of commerce generally. But however dry it may be when shipped, it will absorb the moisture around it; and if any water falls on it from above, it will drain out below in the form of brine and corrode and destroy whatever iron it comes in contact with.

Of course, the master says it was properly stowed. The mate avoids giving an opinion on the question, and says the iron was in the ship before the salt was offered, and the master had to take it. But the stevedores, who know more about the matter than the mate, speak of this salt as a part of the cargo, while yet the iron was unstowed. And the mate is mistaken as to the law. A carrier is not bound to take goods which are likely to injure goods already received for carriage. (2 Pars. Con. 174.)

But it is not likely that the master had anything to do with receiving or stowing the cargo. The owners put the Nith up for Portland, and the freight clerk received the freight as it came on the quay and gave receipts for it, which were afterwards extended into formal bills of lading and signed by the master as the agent of the owners; and in the mean time the cargo was stowed by the stevedores, who were especially employed by the owners for that purpose.

On the trial the claimant produced six witnesses who testified

as experts that the stowage was good. Three of them are British ship-masters temporarily in this port. One of them, the master of the *Roscrana*, undertook to emphasize his testimony on this point by saying that on his voyage out from Liverpool he had brought a cargo of salt and iron, in which the latter was stowed in the hold under the salt. But on being presented with his own bill of lading for 520 bundles and bars of Swedish iron, noted, "Stowed in 'tween decks," he was taken aback, and tried to get out of the dilemma by saying there was some *pig* iron stowed in the hold.

On the other hand, the libellants produced five witnesses who testified as experts that this iron was badly stowed, and that salt should never be stowed over iron, except *pig*, unless a tight deck or bulkhead is put between them, which will carry the drainage, if any, to the sides of the vessel. These witnesses are all persons of good standing in this community. They are not sea tramps, here to-day and gone to-morrow, but men of substance and permanence, who are responsible for what they say. They are all seamen now living ashore. Four have served as masters for many years, and the other, who rose to the rank of first officer, is now engaged in the hardware business.

Their testimony, under the circumstances, far outweighs that of the claimants on this question. But as I have said, it needs no expert testimony to show that this stowage was bad. The fact is apparent to any person of common sense and ordinary intelligence.

But the error of this stowage can be demonstrated on another ground beyond cavil. Admitting for the present, that the salt might have been safely stowed over this iron, as it was, still, it should not have been stowed so near the mast. One of the most candid and considerate of the claimants' seafaring witnesses, C. C. Planch, admitted that in this particular the stowage was bad, and that the dunnage between the salt and the mast ought to have been, at least, four or five inches, instead of one or two; and in my judgment he might well have said one or two feet, and included the crates and iron as well as the salt. Had this been the case, the water that went down the rent in the mast-coat would have run off to the bottom of the vessel without

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touching the cargo. The fact that the mast-coat is liable to break in such weather, as may be expected off the Horn in the passage to the west during the winter, is a circumstance which proper skill and diligence in stowing cargo will take into consideration and provide against. This was certainly not done in this case, when at least four or five feet of salt was stowed over crates and iron within an inch or so of the mast. And so, when the peril came, and the water went down the mast in a stream of some inches in quantity, it necessarily came in contact with the salt, which carried it downward and outward, on either hand, in the form of pickle, to the straw in the crates, which naturally conducted it still farther in the same direction, until, as I have said, it was arrested by its affinity for the iron, and converted into rust.

And this gives occasion to notice the argument or suggestions of some of the claimants' expert witnesses, that the presence of the salt added nothing to the peril, as the sea water that went down the rent was sufficient to have rusted the iron anyway. But the difference between the corrosive power of simple sea water, which contains only four ounces of salt to the gallon, and water drained through a bank of salt and containing probably thirty-three per centum of the same, is something material. Besides, if the salt had not been there, the water would not have been diverted from a direct line, and at most would only have wetted the ends of the iron, and the injury would have been comparatively small. But, in my judgment, it was bad stowage to place either of the articles so near the mast, where they were liable to become wet or even moist from the passage of water down the same.

If the salt, crates, iron, and anvils had been dunnaged away from the mast one or two feet, the water that went through the rip in the mast-coat would have passed down to the bottom of the vessel without touching either of them, and the cargo would have reached its destination, so far as this peril is concerned, in good condition.

Admitting that the cargo was properly stowed in every other respect, it was faulty in this. It was the duty of the carrier to guard against this peril of the sea by leaving a sufficient space

between the cargo and the mast to allow any leakage at this point to pass directly down the latter without coming in contact with the former, into the bottom of the vessel, and within the suction of the pumps.

In *The Reeside*, 2 Sum. 371, Mr. Justice Story says: "Dangers of the seas, whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

In *Richards v. Hansen*, 1 Fed. Rep. 61, Mr. Justice Clifford, after citing this passage from the opinion in *The Reeside*, *supra*, says: "Hence it is that if the loss occurs by a peril of the sea that might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability."

In this case there was a manifest failure to exercise such skill and diligence: (1) In discovering and repairing the rent in the mast-coat, assuming that it was broken in the night, and not discovered or repaired, as stated in the protest, until four, P. M., the next day; (2) in stowing the salt over the iron and anvils, as was done; and (3) in stowing the iron, crates, and salt, and particularly the latter, around the mast without leaving sufficient space for any water that might come through the mast-coat to pass down without coming in contact with the cargo.

The only remaining question is that of damages. The measure of damages in this class of cases, where there has been a failure to deliver, is the current value of the goods at the port of destination, with interest on the same. Some of the authorities say that the allowance of interest should depend on circumstances. But I do not see why it should be disallowed in any case where the shipper is entitled to damages for non-delivery. From the date of such non-delivery the owner, by the fault of the carrier, is deprived of the use of the money or capital invested

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in the goods, and should have redress by being allowed legal interest thereon. The tendency of the modern authorities is to allow interest in all cases, and surely this is one in which it ought to be allowed, if in any.

The libellants are wholesalers and jobbers in iron, and sell to retailers and consumers in this market. The current price at this port, in their trade, of the iron and anvils, at the time delivery ought to have been made, is the measure of their damages; and that is the sum claimed in the libel—\$3,700.17. (*The Gold Hunter*, Blatchf. & H. 308; *Sutherland on Damages*, 217; *M. & M. Ry. Co. v. Jurey*, 111 U. S. 596; *Flanders on Maritime Law*, 158, n. 4; *Watkinson v. Laughton*, 8 Johns. 216; *Bracket v. McNair*, 14 Johns. 170; *Sturges v. Bissell*, 42 N. Y. 464; *Carver*, C. S. sec. 727; *Sedgwick on Damages*, 355.)

One year and ten days have elapsed since the arrival of the Nith in this port, and allowing ten days for the delivery of the goods, the libellants are entitled to the legal rate of interest—eight per centum on the amount of the damages for one year—\$296.01.

A decree will be entered that the libellants recover the sum of \$3,996.18, together with their costs and disbursements; and unless the same is paid within ten days from the date of the decree, execution may issue to collect the amount from the stipulators.

JAMES B. MONTGOMERY v. THE UNITED STATES.

CIRCUIT COURT, DISTRICT OF OREGON.

SEPTEMBER 8, 1888.

1. CLAIM TO A PATENT FOR LAND. — The word "claim," as used in the act of 1887 (24 Stats. 505), giving this court jurisdiction to hear and determine certain claims against the United States, includes a "claim" by a purchaser of timber land under the act of 1878 (20 Stats. 89) to have a patent issue for the same. (The ruling in *Jones v. United States* affirmed.)
2. SALE OF TIMBER LAND UNDER ACT OF 1878. — A sale of timber land under the act of 1878, by the register and receiver of the local land office, is completed on the payment of the purchase price and the delivery of the certificate or receipt therefor, and it is not necessary that the same should be ratified or confirmed by the commissioner of the general land office; but it is the duty of such commissioner on receiving "the papers and testimony in the case" from the local land office, if it appears *prima facie* therefrom that the law has been complied with, to cause a patent to issue thereon to the purchaser.

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3. JURISDICTION OF EQUITY IN PERSONAM AND UNDER THE ACT OF 1887.—A court of equity has jurisdiction of suit to compel the specific performance of a contract to convey land, without reference to the locality of the same; and this court has jurisdiction under the act of 1887 of a suit against the United States to compel the issue of a patent to a purchaser of timber land under the act of 1878, although the same is situated in Washington territory.

Before DEADY, District Judge.

Mr. W. Scott Beebe and Mr. James K. Kelly, for the plaintiff.

Mr. Lewis L. McArthur, for the defendant.

DEADY, J. This suit is brought under the act of March 3, 1887 (24 Stats. 505), entitled "An to provide for the bringing of suits against the government of the United States," to compel the issue of a patent to the petitioner to the southwest quarter of section 10, in township 9 north, of range 1 west, of the Walamet meridian.

It is alleged in the petition that the petitioner resides in Multnomah County, Oregon; and it appears therefrom that the land in question is situated in Cowlitz County, Washington territory, and is of the value of \$5,000 and not more than \$10,000; that on October 28, 1882, said land was surveyed public land of the United States, and subject to entry and purchase under the act of June 3, 1878 (20 Stats. 89), for the sale of timber lands in the Pacific states, including Washington territory, "and was valuable chiefly for timber, but unfit for cultivation;" that on said October 28th the petitioner was a citizen of the United States, and having complied with the requirements of said act and the regulations governing the acquisition of lands thereunder, so as to enable him to pay for the same and claim a patent therefor from the United States, did on said day, at the United States land office at Vancouver, Washington territory, purchase said land from the defendant, and did then and there pay to the receiver of said land office the purchase price therefor, to wit, the sum of \$400, or \$2.50 an acre; and that said receiver gave the petitioner "a certificate or receipt" for said money, as "being in full" for said land.

That the defendant keeps and retains said money; and its servants, whose duty it is to execute and deliver to the petitioner

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a patent for said land, although often requested, refuse so to do, and deny the right of the petitioner to have the same, or to any interest therein.

The prayer of the petition is that the court will decree that the defendant issue to the petitioner a patent for said land.

Due service was made of the petition, as provided in section 6 of the act of 1887, and the district attorney appears for the defendant and demurs to the petition.

The causes of demurrer are the same as those that were argued and determined in *Jones v. The United States*, decided in this court on July 16, 1888, in which it was held that an applicant for land under the timber act of 1878, "becomes the purchaser thereof when he makes the prescribed proof to the satisfaction of the register and pays the prescribed price therefor," and "when the certificate of purchase is issued the applicant the land described therein becomes his property. The bare legal title is all that remains in the vendor in trust for the vendee; and if it was the case of a private person, a court of equity would compel him to perform his part of the contract by executing and delivering to the vendee the proper conveyance thereof;" and (2) that "the claim" against the United States for a patent arising on this contract of sale with the petitioner is in its nature "enforceable by a suit in equity in this court for a specific performance of the same; and this brings the petitioner within the act of 1887, which gives her the right to sue the United States on any claim arising on contract, by a suit in equity, as if the United States were suable, which must mean, as if the United States was a private person;" and also, (1) that the land in question is without the territorial jurisdiction of the court; and (2) that this sale under the act of 1878 is not binding on the government until it is ratified or confirmed by the commissioner of the general land office.

As to the second point, it is sufficient to say that the statute provides that on payment of the purchase money "the applicant may be permitted to enter the same and on the transmission to the general land office of the papers and the testimony in the case a patent *shall issue* thereon."

It may be admitted that, notwithstanding the peremptory

language of the statute, "the papers and testimony in the case" must show a *prima facie* compliance with the law before the purchaser is entitled to the patent. And if there was any fraud in the proceeding before the local land office, sufficient to vitiate the purchase and overcome the *prima facie* case, the government can set it up as a defense to the suit for specific performance, where the rights of the parties may be examined and passed on judicially as they ought to be.

As to the first point, the objection is founded on a misconception of the nature of the suit. This is not a local action to recover the possession of the land, but a transitory one to enforce the specific performance of a contract concerning the same. In such a proceeding a court of equity operates by its decree *in personam* on the defendants, and not *in rem* on the subject-matter; and therefore it matters not whether the land which is the subject of the contract is within the territorial jurisdiction of the court or not. If the court gets jurisdiction of the parties it has jurisdiction to determine what, if any, contract exists between them, and enforce it against the party in default; and may compel obedience to its decree by proceedings in the nature of punishment for contempt. (3 Pomeroy's Eq. sec. 1317; 2 Story's Eq. sec. 743.)

But, assuming, as I do, that "the claim" of the plaintiff is within the purview of the act of 1887, this court has jurisdiction in this case without reference to the locality of the land, simply because Congress by that act has conferred it. The petitioner is required to bring his suit, not in the district where the land is situated but in that in which he resides. The United States is potentially existent or resident throughout the states and territories, and agrees by the terms of the act to submit to the jurisdiction of the court in which the suit is brought, on due notice thereof being given to its attorney and representative. And thus the court gets jurisdiction of the parties and the cause, and it is immaterial, either under the statute or the general principles of equity jurisdiction, where the land for which the patent is sought may lie.

The demurrer is overruled.

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FREDERICK W. SHARON, AS EXECUTOR, COMPLAINANT, v.
DAVID S. TERRY AND SARAH ALTHEA TERRY, HIS WIFE,
DEFENDANTS.

FRANCIS G. NEWLANDS, AS TRUSTEE, ET AL., COMPLAINANTS,
v. DAVID S. TERRY AND SARAH ALTHEA TERRY, HIS
WIFE, DEFENDANTS.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 3, 1888.

1. **REVIVAL OF SUIT ABATED BY DEATH—OBJECTIONS TO COLLATERAL ATTACK.**—Upon proceedings to revive a suit in equity abated by the death of the complainant, for the purpose of executing a final decree which has been rendered in such suit, no objections can be taken which could have been urged when the original bill was pending, except want of jurisdiction apparent upon the record. An attack upon a judgment or decree in a proceeding to revive it is a collateral attack, and can only avail when there is a want of jurisdiction, either of the parties or of the subject-matter.
2. **JURISDICTION TO CANCEL FORGED MARRIAGE CONTRACT—MONEY VALUE.**—The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract, if genuine, and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract, within the meaning of the acts of Congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed when the question of jurisdiction is raised.
3. **SAME—PROPERTY RIGHTS AGAINST HUSBAND.**—The right of action to cancel a marriage contract, which, if genuine, and followed by the requisite consummation as mentioned above, would create rights in the property of the alleged husband, survives to his executor or administrator.
4. **TRANSFER OF PROPERTY PENDING SUIT.**—The transfer of the property of the plaintiff in a suit to cancel a forged marriage contract while such suit is pending does not abate it, if the plaintiff retain a right during his life to claim the rents and profits thereof, and the purchasers or beneficiaries under such transfer are entitled to the benefit of the decree rendered in such suit canceling the contract, to protect the property from claims made under or by virtue of it.
5. **JURISDICTION—FIRST SUIT COMMENCED.**—Where the jurisdiction of the circuit court of the United States has attached in a suit brought by a citizen of a state other than that in which the court is held, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court.
6. **COURT FIRST OBTAINING JURISDICTION, RETAINS IT.**—Where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to

render the latter's decision subordinate to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree.

7. **SAME—EXCEPTIONS.**—The exceptions to the rule that priority of jurisdiction controls priority of decision are, *first*, where the same plaintiff has asked in different suits a determination of the same matter; and, *second*, where the cases are upon contracts or obligations, which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.
8. **DECREE CANCELING FORGED INSTRUMENT—EFFECT OF.**—The decree of a circuit court of the United States canceling a forged marriage contract, may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a state court.
9. **SECTION 720 OF THE REVISED STATUTES CONSTRUED.**—Section 720 of the Revised Statutes, prohibiting injunctions by any court of the United States to stay proceedings in a state court, does not apply where the federal court has first obtained jurisdiction of the subject-matter of the proceedings, and of the parties in the state court. This section must be construed in connection with section 716 of the Revised Statutes, which provides that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and
SABIN, District Judge.

STATEMENT OF THE CASES.

These cases are brought to revive and carry into execution a final decree of this court in the suit of *William Sharon v. Sarah Althea Hill*, entered as of the twenty-ninth day of September, 1885. On the third day of October, 1883, William Sharon, a citizen of the state of Nevada, since deceased, instituted in the circuit court of the United States for the district of California, a suit in equity against Sarah Althea Hill, now Sarah Althea Terry, to obtain its decree adjudging a certain paper in her possession, purporting to be a declaration of marriage between them, to be a forgery, and enjoining its use and directing its cancellation.

In his complaint, after stating his citizenship in Nevada, and the citizenship of the defendant in California, he set forth in substance this: That he was and had been for some years an unmarried man; that formerly he was the husband of Maria Ann Sharon, who died in May, 1875; and that he had never been the husband of any other person; that there were two children living, the issue of that marriage, and also grandchildren, the children of a deceased daughter of the marriage; that he was possessed of a large fortune in real and personal property; was extensively engaged in business enterprises and ventures, and

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had a wide business and social connection; that, as he was informed, the defendant was an unmarried woman of about thirty years of age, for some time a resident of San Francisco; that within two months then past she had repeatedly and publicly claimed and represented, and then declared and represented that she was his lawful wife; that she falsely and fraudulently pretended that she was duly married to him on the twenty-fifth day of August, 1880; at the city and county of San Francisco; that on that day they had jointly made a declaration of marriage, showing the names, ages, and residences of the parties, jointly doing the acts required by section 75 of the Civil Code of California to constitute a marriage between them, and that thereby they became and were husband and wife according to the law of that state. /

The complainant further alleged that these several claims, representations, and pretensions were wholly and maliciously false, and were made by her for the purpose of injuring him in his property business, and social relations; for the purpose of obtaining credit by the use of his name with merchants and others, and thereby compelling him to maintain her; and for the purpose of harassing him, and in case of his death, his heirs and next of kin and legatees, into payment of large sums of money to quiet her false and fraudulent claims and pretensions. He also set forth what he was informed was a copy of the declaration of marriage, and alleged that if she had any such instrument it was "false, forged, and counterfeited"; that he never on the day of its date, or at any other time, made or executed such document or declaration, and never knew or heard of the same until within a month previous to that time, and that the same was null and void as against him, and ought in equity and good conscience to be so declared, and ordered to be delivered up, to be annulled and canceled.

The complaint concluded with a prayer that it be adjudged and decreed that the said Sarah Althea Hill was not and never had been the wife of the complainant; that he did not make the said joint declaration of marriage, or any marriage between them, and that she be perpetually enjoined and restrained from making said allegations, representations, and pretensions of marriage with him; that said contract or joint declaration of mar-

riage be decreed and adjudged to be "false, fraudulent, forged, and counterfeited," and ordered to be delivered up, to be canceled and annulled, according to the practice of courts of equity in like cases; and that he might have such other and further relief as the nature and justice of the case might require.

The complaint was verified in the usual form by his oath. It was filed, as stated above, October 3, 1883, and on the same day a subpoena was issued thereon, which was personally served by the marshal on the defendant, at San Francisco, two days afterwards — October 5th.

On the 3d of December following, the defendant appeared in the suit by solicitors, giving her name as Sarah Althea Sharon, and demurred to the complaint on the alleged ground that it did not contain any matter of equity whereon the court could make any decree or give the complainant any relief against her. The demurrer was argued at the ensuing February term in 1884, and overruled, with leave to the defendant to answer by the next rule day on the usual terms. The case as presented was held to be a proper one for equitable relief. "This supposed contract," said the court, "is alleged to be a forgery, and to be fraudulent. It purports to be in writing and to be signed by the parties; and the defendant claims by virtue of it to be the wife of complainant, and to have an interest in his property, which is alleged to be of the value of several millions of dollars. There is no adequate remedy at law for complainant against the claim set up, under the alleged contract, and no means at law to annul it at the suit of complainant. The defendant can choose her own time for enforcing her claim under the alleged contract, even after the death of the other party. Fraud has always been one of the principal heads of equity jurisdiction."

"The instrument in question is alleged to be a forgery and a fraud. If it is a forgery, it is of course a fraud also. The only parties who appear to have any personal knowledge of the facts, so far as indicated — who personally know anything about this transaction — are the two parties to the alleged fraudulent contract. One is alleged to be many years older than the other, the complainant being alleged to be sixty and defendant twenty-seven years old. The elder, in the ordinary course of nature, is

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more liable to die, and the contract, in such an event, would be in control of the defendant, without any testimony to defeat the fraud, if fraud there be. The right to several millions of property might be in after years affected and controlled by reason of the alleged fraud. A great wrong and injustice may be thus perpetrated in consequence of it, unless a court of equity can take hold of and cancel it. There is no way by an action at law, that we are aware of, to meet the conditions or effectually dispose of this instrument." (10 Sawy. 49, 50.) And again: "If there is no remedy in equity for such a wrong as is charged, then the law is indeed impotent to protect the community against frauds of the most far-reaching and astounding character."

After the case had been commenced in the circuit court of the United States and process served, the defendant, by the name of Sarah Althea Sharon, commenced an action in one of the superior courts of the city and county of San Francisco against the said William Sharon, alleging in her complaint that they had been married by virtue of the said declaration of marriage—that is, the same contract for the cancellation of which, on the alleged ground of its forgery, the suit in the circuit court of the United States had been commenced—and praying that her said marriage might be declared legal and valid, and then that she might be divorced from him by reason of certain infidelities to his marriage contract committed by him, which are specially set forth. In that complaint assuming, without stating, what was generally known in the community, that the defendant was a man of large wealth and had a large income, she alleged that when they intermarried he did not have over five millions of dollars, and that his income did not then exceed the sum of thirty thousand dollars a month, but that since such intermarriage they had, "by their prudent management of mines, fortunate speculations, manipulations of the stock market, and other business enterprises, accumulated in money and property more than ten millions of dollars (\$10,000,000), so that now the defendant has in his possession or under his control money and property of the value of at least fifteen millions of dollars (\$15,000,000), from which he receives an income of over one hundred thousand dollars per month." She,

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therefore, further prayed that an account might be taken of their business transactions to ascertain their common property, in order that it might be equitably divided between them.

William Sharon filed an answer to that complaint, denying, among other things, that he was ever married to the said Sarah Althea, and averring that the said alleged declaration of marriage between them, purporting to have been signed by him, was a false and forged document, which he had never signed and never heard of until within sixty days then past.

When the defendant in the circuit court, upon the overruling of her demurrer, was called upon to answer, she set up as a plea in abatement to that suit, the pendency of the action in the superior court of the city and county of San Francisco, upon the theory that as that action, though subsequently commenced, was founded upon the assumed validity of the alleged marriage contract and involved a determination of that question, and the action after being removed to the federal court had been remanded back to the state court by stipulation of parties, and was then on trial, the circuit court of the United States ought to stay its proceedings in the original suit until the state court had expressed its opinion in reference to the validity of the contract in question, and then accept its judgment as conclusive.

The plea also set up that the circuit court of the United States had no jurisdiction of the case, on the ground that the plaintiff was, and had been for more than three years, a resident and citizen of California. The plaintiff traversed both pleas, and the court held both to be bad—the first because the two suits were not identical, but for different objects, the one proceeding upon an assumed valid contract, and asking for a divorce and a division of the community property; and the other seeking a cancellation of the contract for alleged forgery; and because the two suits were pending in courts of different jurisdiction. (*Stanton v. Embrey*, 93 U. S. 548; *Gordon v. Gilfoil*, 99 U. S. 169, 178.) The second plea as to the citizenship of Sharon was held to be false, no testimony impeaching the allegations of the complaint in that respect having been offered. (10 Sawy. 394.) These pleas having been overruled, the defendant was allowed thirty days to answer to the merits, and accordingly,

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on the thirteenth day of December, 1884, she filed such answer. In the mean time, subsequent to the disposition of the special pleas of the defendant, the superior court of the city and county of San Francisco had decided the case before it, holding the said declaration or contract of marriage to be a genuine and valid instrument, by virtue of which the parties thereto had become husband and wife.

In her answer, therefore, the defendant not only denied the several allegations of the complaint as to the citizenship of the plaintiff; as to the plaintiff's never having been the husband of any other person than Maria Ann Sharon; and as to her being an unmarried woman; and that her "claims were made for any other purpose but that of obtaining the recognition and support justly due" to her as wife of the plaintiff; but set up as a separate defense the action of the superior court of the city and county of San Francisco, and its judgment that the said alleged declaration of marriage was a genuine instrument by which the parties were made husband and wife. A supplemental answer averred that the state court had filed its decree and findings, re-affirming its adjudication as to the genuineness of that instrument. One of its findings set forth the alleged marriage contract, and added, "which was the only written declaration, contract, or agreement of marriage ever entered into between said parties, and at the time of signing said declaration, plaintiff and defendant mutually agreed to take each other as, and henceforth to be to each other, husband and wife."

To these answers replications were filed, whereupon proofs were taken by the parties, which occupied several months. On the twenty-ninth day of September, 1885, the cause was submitted on the pleadings and proofs, after elaborate arguments of counsel. Whilst it was pending before the court undecided, and on November 13, 1885, the plaintiff, William Sharon, died. The decree when rendered was therefore entered as of the day when the cause was submitted, in accordance with the usual practice in such cases. By that decree it was ordered and adjudged that the alleged declaration of marriage was not, nor was any part thereof, signed or executed on said twenty-fifth day of August, A. D. 1880, or at any time by the plaintiff, William

Sharon; that it was not his declaration, contract, agreement, or other instrument; but was a false, counterfeited, fabricated, forged, and fraudulent instrument, and as such was null and void; and that the said instrument, within twenty days after notice of the decree to the defendant, or to her solicitors, should be delivered by her to, and deposited with, the clerk of this court, to be indorsed "canceled"; and that upon such delivery, the clerk should write across the same "canceled," by virtue of this decree, and sign his name and affix thereto the seal of this court; and that the document should thereafter remain in the custody of the clerk, subject to the further order of the court. The decree concluded as follows: "And it is further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent, and her and their agents and attorneys, be, and they and each and all of them are, hereby perpetually enjoined from alleging the genuineness, or the validity of said instrument, and from making any use of the same in evidence, or otherwise to support any right claimed under it, or making any claim, or setting up any right, interest, or claim of any kind, under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit."

William Sharon left a last will and testament, in which he named his son, Frederick W. Sharon, and his son-in-law, Francis G. Newlands, as executors. Newlands declined to act, and to Frederick W. Sharon, as sole executor, letters testamentary were issued. As such executor he, on March 12, 1888, filed one of the bills, the titles of which are given above, to have the suit revived in his favor as such executor, so that proceedings may be had for the enforcement of the decree. He alleges that the suit and proceedings under the decree have abated by the death of Sharon; that the alleged marriage contract, adjudged to be a forgery, has not been surrendered for cancellation as ordered by the decree, and he fears that the said defendant will claim and

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seek to enforce property rights as the wife of William Sharon by virtue of that written declaration of marriage, under the decree of another court (the superior court of the city and county of San Francisco), essentially founded thereon, which, as he is advised, is wholly subject and subordinate to the decree of this court, contrary to the true intent, meaning, and spirit of the perpetual injunction ordered, and in violation thereof. He alleges the marriage of the defendant with David S. Terry, who is joined as a defendant with her, and prays the process of the court to the end that the said suit and proceedings therein may stand revived in his favor, and be in the same condition and plight in which they were at the time of the abatement.

On the 4th of November, 1885, William Sharon executed a deed of his property, real and personal, to his son-in-law, Francis G. Newlands, and his son, Frederick W. Sharon, subject to various trusts. Without specifying the details of the said trusts, it may be stated generally that they are designed to secure for some years the protection and management of the property, which is of great value, amounting to several millions of dollars, and its final distribution to the children and grandchildren of the grantor, and to others related by blood or marriage to him. It reserves, however, a power in the grantor to require at any time the trustees to pay over to him "the whole or any part of the net income, rents, issues, and profits of said property" remaining after making certain monthly payments to his children and to his son-in-law for his grandchildren. It also reserves a power in him to direct a distribution and conveyance of his property at any time during his life to the beneficiaries named, instead of at the periods designated therein. It concludes with a solemn asseveration that the said Sarah Althea Hill was not and never had been his wife; that he never proposed marriage to her, or married her in any form or manner whatever; that the so-called marriage contract and "dear wife" letters introduced by her in evidence in the state court were forgeries; that all her claims to wifehood were based upon forgeries and perjuries, and he "specially empowers and directs" the trustees "to vigorously contest in every court where a contest can be made" her false claim and pretensions. Frederick W. Sharon has since resigned the duties

and powers of said trust, and the execution of the trusts has devolved upon the other trustee named, Francis G. Newlands. And he, as such trustee, and other parties and beneficiaries under the trust deed, on April 14, 1888, filed the other of the bills, the titles of which are given above, which is an original bill in the nature of a bill of revivor and supplement to carry the decree in *Sharon v. Hill* into execution for their benefit. It sets forth with particularity the proceedings in the suit in the circuit court of the United States, and the decree rendered therein, and its non-execution and the abatement of the suit by the death of Sharon, and the execution and contents of the trust deed; also, the commencement and prosecution by said Sarah Althea of the action in the state court claiming to be his wife under the said declaration of marriage, and the proceedings and judgment therein. It avers that the matter in suit in the circuit court exceeded the sum or value of five hundred dollars; that the property of Sharon was of the value of five millions of dollars over and above his debts and liabilities; that said Sarah Althea Hill claimed all the rights of a wife under the laws of the state of California in the property of the plaintiff, and to a reasonable support from him as her husband, and to a share in the property acquired by him after the date of said declaration of marriage; that such support was of the value of at least five hundred dollars per month, if she was in fact his wife; that she also claimed and asserted a right to one half of all the property acquired by said William Sharon after the twenty-fifth day of August, 1880, and that she is entitled as her share of such property to at least five millions of dollars; that said claim was disputed as false and fraudulent by the said William Sharon, and is now disputed by his successors in interest, and that it was the object of the suit in this court to protect the property and property rights of said William Sharon, and of the complainants as his successors in interest against said claims, which were settled by the decree of this court, enjoining her from asserting any property rights either as the wife of complainant, or under or by virtue of said declaration of marriage.

The bill also sets forth that the state court expressly found and adjudged that the declaration of marriage (which the circuit

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court has held to be a forgery and annulled) was the only written declaration, contract, or agreement of marriage ever entered into between the parties, and upon such findings and adjudication rendered its judgment, declaring that Sarah Althea was his wife, and granting her a divorce from such marriage, and awarding her one half of all the community property accumulated by him after August 25, 1880; and ordering an accounting to ascertain the community property; that the defendant, now Sarah Althea Terry, is threatening and endeavoring for the first time to proceed with an accounting under her judgment of divorce, for the purpose of enforcing a division of the property acquired by William Sharon after August 25, 1880, and that she is seeking to discover and inspect the books of account kept by him, to the great injury and harassment of the complainants.

The bill also sets forth that the state court made an allowance of alimony by its order, as follows: "It is hereby ordered that the defendant (William Sharon) pay to the plaintiff (Sarah Althea) or her order, on or before the ninth day of March, 1885, the sum of seven thousand five hundred dollars as alimony herein, and the further sum of two thousand five hundred dollars on or before the eighth day of April, 1885, and the same amount on or before the eighth day of each and every month hereafter as alimony, until the further order of this court;" that this judgment was afterward modified on appeal by the supreme court of the state on the thirty-first day of January, 1888, by striking out therefrom the words "the sum of seven thousand five hundred dollars as alimony herein, and the further sum of two thousand five hundred dollars on or before the eighth day of April, 1886," and inserting in the stead and place of those words, "the sum of fifteen hundred dollars as alimony herein, and the further sum of five hundred dollars, on or before the eighth day of April, 1885;" that the said defendant, Sarah Althea Terry, is seeking to enforce that judgment, as modified, to the injury and harassment of the complainants; that the said judgment of alimony was founded upon and subsists essentially by virtue of the said declaration of marriage, adjudged by this court to be forged and fraudulent and fabricated, and that its execution and enforcement ought in equity to be restrained, as an infringement of the

decree, and prior jurisdiction of this court, and of the rights of the complainants thereunder. The complainants therefore pray that the decree in the original suit, and the proceedings in enforcement and execution thereof, may stand revived and be in the same state, plight, and condition, in which the same were at the time of the death of the said William Sharon; and that it may be declared that the complainants, as trustees and beneficiaries, as aforesaid, are entitled to revive the said decree and proceedings thereunder for the enforcement thereof, and to have the full benefit thereof, and to fully enforce and execute the same; and that the decree may be construed and adjudged to forbid and enjoin any and all proceedings in execution or enforcement of the said judgment of the said superior court for alimony; and for an accounting and division of the community property, and that said judgments may be declared void, and of no effect as against the complainants, so far as they authorize any recovery of property or property rights; and that the defendants may be restrained, pending the suits, by an injunction, from taking any further proceedings to enforce or execute the said judgment for alimony, or the said judgment for an accounting and division of community property, and from commencing or maintaining any further suit or suits, proceeding or proceedings of any kind, under or upon either of said judgments against the complainants, or any of them; and that such injunction upon the hearing may be made perpetual, and that they may have such other or further relief in the premises as may be just.

To these two bills to revive and enforce the decree in the case of *Sharon v. Hill*, the defendants have appeared and demurred. The principal grounds of the demurrer in each case are that the court has no jurisdiction of the subject-matter of the suits, or to grant the relief prayed; that the plaintiffs do not show any right or title to maintain their respective suits, and that there is ambiguity and uncertainty in the bills, in that they fail to show what particular property is involved.

Mr. William F. Herrin, Mr. Richard S. Mesick, and Mr. Samuel M. Wilson, for the complainants.

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Mr. John A. Stanley and Mr. David S. Terry, for the defendants.

By the Court, FIELD, Circuit Justice. As appears by the statement herewith filed, the decree of this court in the case of *William Sharon v. Sarah Althea Hill*, entered as of the 29th of September, 1885, adjudged the alleged declaration of marriage between the parties, purporting to be executed on the 25th of August, 1880, to be a forgery, and ordered it to be surrendered and canceled; and enjoined the defendant, and all parties claiming under her, from making any use of the same as evidence or otherwise to support any claim advanced under it, as wife of William Sharon, or to any interest in property of any kind against him, or his heirs, executors, or successors. William Sharon having died, Frederick W. Sharon, as the executor of his last will and testament, has filed one of the bills before us to revive and carry that decree into execution. Francis G. Newlands, as acting trustee, under a deed of trust, executed by William Sharon, a few days before his death, and certain beneficiaries under that deed, have filed the other bill before us, which is an original bill in the nature of a bill of revivor and supplement. It also has for its object to revive the decree in the original suit, and enforce its execution for their benefit.

The demurrers are in form to these bills, but the objections raised by them are intended to apply to the original bill in the suit of *Sharon v. Hill*, and have been argued as though they were in terms directed against it, the position of counsel being that the circuit court possessed no jurisdiction of the subject matter of that suit, and no power to make the decree entered therein; that the same was absolutely null and void, and therefore that there is nothing to revive. These objections could have been urged when the original bill was pending; and, in fact, were presented so far as they relate to the power of the court to grant the relief prayed. (10 Sawy. 50.) And the general doctrine is that objections taken to the original bill, or which might have been thus taken, cannot again be made upon a bill of revivor where the original suit has abated by the

death of the plaintiff. The only questions which can then be raised are whether the party in whose name the revival is asked has succeeded to the interests, rights, or claims of the deceased, or has become the legal representative of his estate—so as to enable him to continue the prosecution of the suit, if not already determined, or to revive it so as to enforce the judgment rendered, if not already executed. If the suit be pending, undetermined, questions previously decided cannot be again raised and reconsidered, any more than they could if the plaintiff had not died, and if the suit has gone to final judgment, objections which might have controlled it, if presented in time, cannot be afterwards urged against its validity, any more than they could by a stranger to the record. An attack upon a judgment in a proceeding to revive it is a collateral attack, and can avail only when there is an absolute want of jurisdiction, either of the parties or of the subject-matter. The leading counsel of the defendants accepts this position, although his argument has covered a wider circuit and embraced many matters which could only be considered by us if we were sitting as a court of appeal, or upon a rehearing of the case. We reminded him, indeed, that we had no more power in the matter than the court which originally decided the case—the court is the same, its members only being different—but we did not limit his argument. We felt the exceeding gravity of the case, and the serious consequences to the parties, whichever way the controversy may be finally determined. If we are to take the judgment of this court as valid and binding, and as importing absolute verity, as the law compels us to do, if the court had jurisdiction of the parties and subject, a case is presented which from its enormity may well make society shudder. We, therefore, have listened to, and with assiduous care have examined every suggestion of the learned counsel, that we might reach if possible a just conclusion.

The main point of his argument is that the original suit was brought to cancel a piece of evidence, which might assist in establishing a marriage between the parties, but which of itself had no value capable of pecuniary estimation—that no such value is alleged in the pleadings, or could be—and therefore

the suit is not within the jurisdiction of the circuit court of the United States under the act of Congress of March 3, 1875, in force when the suit was commenced, prescribing and limiting that jurisdiction. That act as applicable to suits between citizens of different states is as follows: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars . . . in which there shall be a controversy between citizens of different states." (Act of March 3, 1875, U. S. Stats. vol. 18, ch. 137.) This statute, as counsel very justly claims, requires that there shall be a matter or thing in dispute susceptible of a pecuniary valuation, and exceeding the sum or value of five hundred dollars; that the money demand or thing of value must be directly involved in the suit which is tendered for judicial action. We accept the statement as accurately expressing the limits of the jurisdiction of the circuit court, under the statute of 1875. A subsequent statute requires the sum or value of the matter in dispute to be two thousand dollars. By matter in dispute, as held by the supreme court, is meant in an action at law, "the subject of litigation, the matter for which suit is brought, and upon which the issue is joined, and in relation to which jurors are called and witnesses are examined." If the case be one in equity instead of law the definition is equally explicit, the words, "in relation to which jurors are called" being omitted. The matter at issue in the original suit of *Sharon v. Hill* was the alleged contract of marriage between the parties, purporting to have been executed on the twenty-fifth day of August, 1880, and the object of the suit was to enjoin its use and obtain its cancellation as a forgery and a fraud. All the testimony was directed to the establishment of the genuineness of that instrument or to prove its forgery. As the fact was found one way or the other the character of the judgment would be determined. But it is insisted that this contract was not capable of pecuniary estimation; if forged, as claimed on one side, it would be a valueless paper; if genuine, as claimed on the other side, it could of itself establish no property rights in the defendant. What might

ultimately result from the marriage which it might aid in proving was only prospective and contingent, lying among mere possibilities. We do not so construe the alleged contract, or the rights it conferred upon the alleged wife and the obligations it imposed upon the alleged husband. If genuine and valid it established a marriage between the parties from its date, assuming, as claimed by her, that it was followed by the requisite consummation.* It is not a contract to marry at a future day, or an admission that a marriage has already taken place. It is an instrument by which, on the assumption mentioned, the marriage relation was immediately created. It therefore imposed upon him from that date all the obligations of a husband which the law creates, and among which is that of supporting the defendant as his wife, in a manner suitable to his condition of life. In her complaint in the state court, which became by her pleadings in the circuit court a part of the record there, she assumes that he was, when married, worth five millions of dollars, for she avers that he was not then worth more than that sum, with an income of thirty thousand dollars a month, and she alleges that since then, by their joint prudent management, he has become worth ten millions more, and his income has increased to one hundred thousand dollars a month. A reasonable allowance for her support which she might claim from him by virtue of that contract of marriage, if genuine and valid, would greatly exceed the amount required for the jurisdiction of the court.

Again, the contract, if genuine and valid, placed her in a position to claim her rights to a portion of the community property; that is, property acquired by the earnings of both since its date. She alleges in the state suit that such earnings amounted to ten millions of dollars; and if so, under the law, as his wife, she would be entitled to one half thereof, on his decease, against any attempted testamentary disposition. It may be true that he could, notwithstanding the marriage, have disposed of the community property—given it away, perhaps, so as to cut off any claim by her—but the law will not presume that a husband

* NOTE BY FIELD, J.—By *requisite* consummation is meant, what the law required to render the contract operative as a marriage—such as openly living together as man and wife—or as the statute states, “a mutual assumption of marital rights, duties, or obligations.” (Civil Code, sec. 55.)

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will act so as to defeat any rights which his wife might otherwise justly claim under the law, nor will a remedy of a court of equity be refused because one may place his property where a claim cannot be enforced against it.

Again, the contract, if genuine and valid, gave her an inchoate right of dower in the real property which he then possessed in the District of Columbia, amounting in value to three hundred thousand dollars. That right, though, to be enjoyed only in case of her surviving him, had a present substantial value, capable of pecuniary appraisal, and of which he could not deprive her by any conveyance of the property without her joining with him. Tables are framed by which the value of such interest is estimated according to the probable duration of the lives of the parties; and compensation for the value of such interest is constantly made in the transfer of real property in states where the right of dower is allowed. (2 Scribner on Dower, ch. 24, Tables in Appendix.) Such right in the real property of Sharon in the District of Columbia would greatly exceed in value the amount required to give jurisdiction to this court.

We are therefore of opinion that an instrument—such as the declaration of marriage—which, if genuine, and followed by the requisite consummation as claimed, would impose upon the plaintiff the obligation to support the defendant, Sarah Althea, in a manner suitable to his condition; that would give her a right to claim one half of the property in California, subsequently acquired by him, alleged to be of the value of ten million dollars, and would give her an inchoate right of dower in real property in the District of Columbia, worth three hundred thousand dollars—may be safely treated as having a pecuniary value exceeding five hundred dollars, the amount necessary to give the circuit court jurisdiction when the suit was commenced. It is true there is no statement in the pleadings in the original suit of the value of the property of the complainant. It is only alleged that he is possessed of a large fortune in real and personal property; but that its value amounts to several millions of dollars does appear in the evidence presented in that case, and that is all that is necessary to maintain the jurisdiction. It is well settled that where the controversy is not respecting the

amount or value of the matter in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed in behalf of the parties. On this ground the affidavits as to the value of real property owned by William Sharon in the District of Columbia, and also of the value of other property owned by him, were allowed to be filed during the argument. In *Ex parte Bradstreet*, 7 Peters, 634, application was made to the supreme court of the United States for a mandamus to compel the district judge of the northern district of New York to re-instate and proceed to try certain writs of right to land, which were dismissed by him, because it did not appear that they involved the required amount to give the court jurisdiction, and to admit such amendments in the pleadings or such evidence as might be necessary to show that amount. In granting the mandamus, the court, by Chief Justice Marshall, said: "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States, is, to allow the value to be given in evidence. In pursuance of this practice, the demandant, in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, at or before the trial of the cause; and would have a right to give it in evidence in this court." (See, also, *Wilson v. Blair*, 119 U. S. 387, and *Den v. Wright*, Peters C. C. 64, 73.) The practice of admitting such evidence as to the value of the matter in dispute, in order to give the supreme court of the United States jurisdiction to review the judgments of inferior tribunals, where such value does not appear upon the records, is followed at every term.

The doctrine for which the learned counsel contends, if successfully maintained, would strip the federal courts of the most important branch of their jurisdiction in equity cases. That jurisdiction is remedial and preventive; and to frustrate fraud and further justice, may be invoked for the reformation, delivery, or enforcement of contracts or other instruments, or for their surrender or cancellation. "It is obvious," says Story in his treatise on Equity Jurisprudence, "that the jurisdiction, exercised

in cases of this sort, is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest." (Vol. 1, sec. 694.) And again: "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn, or otherwise, still, while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost, or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment." (Vol. 1, sec. 700.)

Now these instruments, which may be thus controlled by the court, are only evidence of the right of the things to which they relate—they are not the things themselves—and in exercising jurisdiction to compel their reformation, delivery, or enforcement, or their surrender or cancellation, the court is merely acting upon the evidence by which the possession and enjoyment of the things may be advanced or defeated. The value of instruments in the sense by which the jurisdiction of the court is determined is the value of the property, the possession or enjoyment of which may be thus affected. Suits to cancel forged contracts, such as a forged deed, are of common occurrence. What is the value of the instrument in controversy in such cases? If it be forged its actual value is nothing; but for purposes of jurisdiction over it by the court, it must be held to have, to the rightful owner of the property, the value of the property, the possession and enjoyment of which is imperiled by it. That such is the gen-

eral understanding of the profession we have no doubt — for we can find no case where jurisdiction of the court has been denied — in the multitude of instances where it has been invoked, because such instrument is incapable of pecuniary estimation. It is everywhere assumed that the property which could be affected by it if genuine is the measure of its value for the purposes of jurisdiction. We might also refer, in support of this view, to that branch of equity jurisdiction which is exercised in discovering testimony or perpetuating it. What is the measure of value in such cases? Clearly for purposes of jurisdiction it must be estimated with reference to the value of the property in relation to which it is desired to discover or perpetuate the testimony.*

✓ A court of equity having jurisdiction to lay its hands upon and control forged and fraudulent instruments, it matters not with what pretensions and claims their validity may be asserted by their possessor; whether they establish a marriage relation with another, or render him an heir to an estate, or confer a title to designated pieces of property, or create a pecuniary obligation. It is enough that, unless set aside, or their use restrained, they may impose burdens upon the complaining party, or create claims upon his property by which its possession and enjoyment may be destroyed or impaired. It is of no consequence therefore that the bill in the original suit of *Sharon v. Hill* may contain matters appropriate to a suit of jactitation of marriage in a spiritual court of England; it also presents matters of which a court of equity in that country and in this has always had jurisdiction; that is, a case where the possession of a forged document by the defendant is alleged, purporting to be executed by the plaintiff, which, if genuine, would impose obligations upon him and create claims upon his property.

The learned counsel of the defendants also contends that the bills cannot be maintained on the ground that the plaintiffs show no title in themselves or legal capacity to maintain the suits. As to the bill of revivor by the executor, Frederick W. Sharon, this position is assumed upon the theory that the decree in the original suit is self-executing; that the cause of action in that

* See *Smith v. Adams*, 130 U. S. 167, 175.

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suit did not survive to the executor; that he only avers that he is the "personal representative" of the deceased plaintiff, without stating that any estate of the deceased has come into his hands. As to the original bill in the nature of a bill of revivor by Newlands and others, the further position is assumed that the original suit abated by the transfer by William Sharon of his property to trustees, under the deed of trust of November 4, 1885. To these several positions there is a ready and satisfactory answer found in the language of the original decree, in the law prescribing the powers and duties of executors, and in the terms of the deed of trust. The original decree is not self-executing in all its parts; it may be questioned whether any steps could be taken for its enforcement until it was revived. But if this were otherwise, the surrender for cancellation of the alleged marriage contract, as ordered, requires affirmative action on the part of the defendant. The relief granted is not complete until such surrender is made. When the decree pronounced the instrument a forgery, not only had the plaintiff the right that it should be thus put out of the way of being used in the future, to his harassment and the embarrassment of his estate, but public justice required that it should be formally canceled, that it might constantly bear on its face the evidence of its bad character whenever and wherever presented or appealed to. In *New York and New Haven Railroad Company v. Schuyler*, 17 N. Y. 592, 599, the court of appeals of New York said: "There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defense at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. . . . Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon title, or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be canceled."

In *Peake v. Highfield*, 1 Russ. 559, a case which came before Lord Gifford, master of the rolls, in 1826, the bill prayed that an instrument purporting to be a deed of conveyance of real

estate by a person since deceased might be delivered up to be canceled. The report of the case states that there was strong evidence that the deed was forged, though the defendant, who was charged with the commission of forgery, stated in his sworn answer that the deed was executed by the party whose deed it purported to be, and a witness testified that he was present at its execution. The defendant's counsel insisted on three points: "*First*, that a court of equity had no jurisdiction on the ground of forgery; *secondly*, that even if the court had jurisdiction in such a case, it would never decree an instrument to be canceled on the ground of its being a forgery, without sending the question to be tried by a jury; *thirdly*, that, at all events, it was impossible in the present case to order the deed to be canceled without a trial at law, since there was a witness who swore he saw it executed." The master of the rolls maintained the jurisdiction of the court, although he ordered an issue to try the fact of forgery, and said: "This court has jurisdiction to order a forged instrument to be delivered up and canceled. In the *Bishop of Winchester v. Fournier*, 2 Ves. Sr. 446, several cases are mentioned, in which forged instruments have been ordered to be delivered up; and they are referred to by Lord Redesdale as unquestioned authorities. In some of them the court made the order at once, that the instrument should be delivered up, without sending the question to be tried by a jury. In *Masters v. Braban*, 1 Russ. 560 (10 July, 1735), the decree made at the hearing, declared a deed to be a forgery. It does not appear that the plaintiffs in the cause prayed that the deed might be declared to have been forged or might be delivered up to be canceled; yet the court made the declaration, and gave the plaintiffs the consequential relief. In *Seecombe v. Fitzgerald*, 1 Russ. 561, the bill was filed to set aside certain notes, and it also impeached a bond which was alleged to be forged. The decree with respect to the bond was, that it should be delivered up to be canceled."

In *Pierce v. Webb and Stalker*, which was before Lord Chancellor Thurlow in 1792, and is reported in a note to 3 Brown's Ch. Cases, pages 16 and 17, the bill prayed that a certain lease of land might be declared fraudulent, and delivered up to be

canceled. It was contended on the part of the defendants that no use could be made of the lease at law, and that equity could not in such a case compel the delivery of a deed, and further that the defendant Stalker, having proved expenses for lasting improvements, was entitled to those allowances; but the Lord Chancellor decreed for plaintiff with costs, and ordered the lease to be delivered up to be canceled, and did not admit any allowances for improvements, saying that: "It has never been doubted that if a man would create a forged deed (of which no use could be made at law), yet equity will interfere and deliver it up."

The doctrine of these cases, as observed by counsel, is in accordance with the statute of this state, which declares that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civil Code, 3412.)*

The cause of action set forth in the original suit survived to the executor. Its object was to have set aside and canceled an instrument which, if genuine and valid, created a claim on the part of the defendant to be supported out of the property of the plaintiff, and inchoate rights which, on his death, would entitle her to a large share of that property. Had no such suit been brought by William Sharon, his executor could have brought one. Indeed, it would be his duty to do so if he believed the instrument a forgery. For the same reasons it is his duty to see that the decree is enforced so far as it may be necessary to protect the property of the deceased against any fraudulent claims, or interfere in any way with its disposition as directed by his will, and for that purpose to seek a revival of the decree. Under the law of this state, the executor or administrator, when there is no will, is entitled to the possession of all the real and personal property of the deceased, until the estate is fully administered, or a decree of distribution is made by the probate court. The heirs or devisees of the deceased can only take possession upon such distribution. Until then the executor or administra-

* See *Clark v. Smith*, 13 Peters, 195, 203; *Broderick Will Case*, 21 Wall. 508, 520; *Holland v. Chatten*, 110 U. S. 15.

tor represents the heirs and devisees, also the creditors of the deceased, and in the interest of all of them is bound to use all lawful means, by suit or otherwise, to preserve and protect the estate against all fraudulent claims by which the title or value of the property in his charge may be impaired. This duty devolves upon them from the very nature of their office (*Meeks v. Vassault*, 3 Sawy. 213; *Cunningham v. Ashley*, 45 Cal. 485), and is independent of the specific powers and duties prescribed by statute. In *Curtis v. Sutter*, 15 Cal. 264, a suit by an administrator to quiet the title of an intestate to real property was sustained by the supreme court of the state against the objection that it was improperly brought in his name. If a suit of that nature may be brought, it is not perceived, as counsel justly observes, why a suit *quia timet* may not be brought by an executor to cancel a forged paper; and, if so, why he may not file a bill of revivor to obtain the benefit of a decree rendered in favor of the deceased in a suit of that character. We have no doubt that whatever suit the deceased might have brought for the protection of his estate from unreasonable, illegal, and fraudulent claims, his executor may bring, and whatever judgments the deceased may have obtained for that protection, which the courts had jurisdiction to render, and which have not been fully enforced, his executor may have revived and enforced. The fact that the executor in his bill simply describes himself as the personal representative of the deceased, without averring that any property of the latter had come into his hands, is of no moment. The bill of revivor is to be read in connection with the record in the original suit, which declares that the deceased was possessed of a large property, real and personal; and it will be presumed that it came into the hands of his executor, where the law places it, in the absence of averments to the contrary. Besides, the only question which can be considered on this bill to revive, is whether the plaintiff is executor of the deceased, and thus succeeds by operation of law to the charge of his property; and this fact is admitted by the demurrer. As said by Mr. Justice Story, in *Slack v. Walcott*, 3 Mason, 508, 512: "When a party plaintiff dies, whose interest is transmitted to some other person, if the title be that of mere representation in law, there is no change in

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the title itself, and the only question that arises is, who is the person entitled to take as representative; that is, in respect to real estate, who is the heir, and in respect to personal estate, who is the executor or administrator. When this fact is ascertained, the person succeeds by operation of law to the whole title of the deceased. A bill of revivor in such case merely substitutes the representative in lieu of the deceased, and states no new fact as to title, except that of transmission by operation of law. The title of representation, or heirship, at least in a court of chancery, is not disputable; but the person in whom it is vested is alone to be ascertained."

The objection that the bill does not describe specifically the property of the deceased is without force. The fact appears in the record of the original suit that the deceased possessed a large and valuable property, the right to portions of which would be affected by the alleged contract if genuine and valid. But it is earnestly contended, both against the bill of revivor and against the original bill in the nature of a bill of revivor, that the suit in the circuit court abated by the transfer of the decedent's property under the deed of trust of November 4, 1885, and therefore the court could not proceed any further therein. Both of the bills have the same object—to revive the original decree and enforce its execution, the latter being necessary because the trustees and beneficiaries under the trust deed take by a title which may be contested, and not like the executor by operation of law. As said in *Slack v. Walcott*: "When a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties the suit is original; it does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far then as it states such matter, it is an original bill; and so far as it seeks to revive upon that matter, it is in the nature of a bill of revivor." But as held in the same case, purchasers and devisees by an original bill in the nature of a bill of revivor may draw to themselves the advantages of the former suit, in whatever stage it may be at the time of the abatement.

To the alleged abatement of the original suit, by the transfer of the decedent's property, there are three answers, each of which is complete. In the first place, the reservations in the trust deed of power in the grantor to claim during his life the payment of the net income, rents, issues, and profits of the property remaining after certain monthly payments to his children, and to his son-in-law for his grandchildren, continued in him sufficient interest in the property to maintain the suit to cancel a forged document, which might lessen the amount of such income, rents, and profits. In the second place, the decree having been entered as of September 29, 1885, was with reference to the trust deed subsequently executed, as though the decree had been announced by the court as of that day. (*Mitchell v. Overman*, 103 U. S. 62; *Borer v. Chapman*, 119 U. S. 596, 597.) In the third place, the deed of trust having been made *pendente lite*, the trustee and beneficiaries took subject to the decree which might be subsequently rendered. The suit being to revoke and cancel an instrument which might otherwise lessen the value of the estate, and having been heard and submitted for decision, it is to be presumed, in the absence of any application by the trustees and beneficiaries to be substituted as plaintiffs, that they desired that the case should be held for such determination in their interest. While they might properly have asked to be joined with the plaintiff, they were not bound to do so. The court had jurisdiction to proceed without them to render the decree.

Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of *Sharon v. Hill*, we proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court.

William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him; and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states—a provision

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which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states. (*Railway Company v. Whitton*, 13 Wall. 270, 289.) So valuable has the right of citizens of other states than the one in which suits are brought against them to have their cases heard in a federal court always been regarded, that at the very outset of the government Congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in a state court he may, under proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the federal court, have the case removed to that court and tried or heard there; and all the acts of Congress have declared that it shall be the duty of the state court in such a case to accept the surety and to proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. As said by the supreme court in *Railroad Company v. Koontz*, 104 U. S. 14, it is well settled that "when a sufficient case for removal is made in the state court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored." As Congress has made such careful provision to secure to citizens of other states a right to transfer to a federal court cases in which they are sued in state courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant properly summoned in the first instance into that court by a citizen of another state, could cut off and practically nullify the latter's constitutional right to a hearing there by instituting a suit in a state court, which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be tolerated. The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible; it is essential to any

orderly and decent administration of justice and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.

In *Wallace v. McConnell*, 13 Peters, 143, we have a decision of the supreme court of the United States illustrative and confirmatory of this doctrine. That case was brought in the district court of the United States for the district of Alabama, exercising the powers of a circuit court, upon a promissory note of the defendant for four thousand eight hundred and eighty dollars. The defendant pleaded payment and satisfaction, and issue being joined therein, the case was continued until the succeeding term. The defendant then interposed a plea of *pais darrein* continuance, alleging that as to four thousand two hundred and four dollars of the sum demanded, the plaintiff ought not further to maintain the action against him, because that sum had been attached in proceedings commenced against him under the attachment law of Alabama, in which he was summoned as garnishee. In those proceedings he had admitted his indebtedness beyond a certain payment made, and the state court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case was ultimately taken to the supreme court, where it was contended that the proceedings under the attachment law of Alabama were sufficient to bar the action as to the amount of the sum attached, and that therefore the demurrer ought to have been overruled. But the court said: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice."

In *Taylor v. Taintor*, 16 Wall. 370, the supreme court, speaking by Justice Swayne, said: "Where a state court and a court of the United States may each take jurisdiction, the tribunal

which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function.”

In *Shoemaker v. French*, Chase’s Dec. 267, a bill was filed in the circuit court of the United States for the district of Virginia by the plaintiff Shoemaker, for an injunction to prevent the defendant French from acting as president of the Alexandria and Washington Railroad Company, and an order was made directing that he be served with notice of motion for the injunction. After this French filed a bill in a state court of Virginia, praying an injunction against Shoemaker for matters cognate to the bill in the circuit court; and Chief Justice Chase, in granting the prayer of the bill in the circuit court, said: “The jurisdiction of this court as to these matters attached when Shoemaker’s bill was filed here, and the order passed by this court. Therefore the jurisdiction of the state court was ousted, or must be exercised in subordination to the jurisdiction of this court.”

The doctrine that where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter’s decision subordinate to that of the other, prevails very generally both in the federal and state courts, with some exceptions, which we shall hereafter consider. Thus in *Gaylord v. Fort Wayne, Muncie, and Cincinnati Railroad Company*, a bill was filed in the circuit court of the United States for the district of Indiana, to obtain, among other things, the appointment of a receiver of the property of an insolvent corporation, and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained and an amendment made, a receiver was appointed. Whilst proceedings were thus pending in the federal court, a suit was commenced in a state court of Indiana, in which a receiver was also appointed,

who took possession of the property. Subsequently the parties thus having possession surrendered the property to the receiver of the federal court upon his application and the presentation of its order. He was thereupon arrested by the state court, but the federal court released him, and he retained the property, the court refusing to rescind the order appointing him. In disposing of the case the federal court said: "We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled." (6 Biss. 286, 291.)

In *Union Mutual Life Insurance Company v. Chicago University*, a bill was filed in a state court of Illinois to enjoin the foreclosure of a mortgage, and have it set aside and declared void. Later on the same day a bill was filed in the circuit court of the United States for the northern district of Illinois to foreclose the mortgage. The process of the federal court was first served, preceding by a few hours the service of process from the state court; and it was held that the fact that process from the federal court was first served gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage. In deciding the case the court, speaking by Judge Drummond, said: "It is undoubtedly a very embarrassing state of litigation, there being two suits, brought in two jurisdictions, involving, to a great extent, the same subject-matter, and I have felt some difficulty in determining what is the true rule upon this subject, but I have come to the conclusion that it must be this: That this court has a right to go on, as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago; that is to say, which shall prevent that corporation from ever setting up any claim or right to this property, or any claim whatever that it had not the right to execute this mortgage." (10 Biss. 191, 195.)

In *Mason v. Piggott*, in the supreme court of Illinois, it appeared that the defendant, instead of making a defense in an action pending in a court of law, had attempted to transfer the case to a court of equity, and the court said: "It by no means follows because a court of equity has concurrent jurisdiction with a court of law, that it will take cognizance of a case already pending in a court of law and oust it of jurisdiction. As a general principle, in all cases of concurrent jurisdiction, the tribunal which first obtains jurisdiction of the subject-matter must proceed and finally dispose of it. A court of equity will not take jurisdiction where it has first been acquired by a court of law, unless there is some equitable circumstance in the case which the party cannot avail himself of at law. Subject to this qualification, the rule is inflexible." (11 Ill. 88.)

In *Bank of Bellows Falls v. Rutland R. R. Co.*, in the supreme court of Vermont, it appeared that the defendant, in an action at law pending against him in Massachusetts, had filed his bill in a Vermont court of chancery to enjoin the action. The bill was dismissed, and the court, admitting the power of a court of equity to enjoin parties within its jurisdiction from proceeding in a court of law in another state, said: "We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction, the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party, having the law in his favor, from bringing his case fairly and fully before a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary, as matter of policy, to prevent a conflict in the action of different courts." (28 Vt. 470-477.)

In *Stearns v. Stearns*, in the supreme court of Massachusetts, a decree of the probate court appointing commissioners to make partition of an estate among the heirs was reversed, because proceedings were first commenced for that purpose in another court of concurrent jurisdiction against the parties moving the decree, which proceedings were pending when the decree was rendered,

the court saying that "when different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must necessarily have authority *paramount* to the other courts; or, rather, the action first commenced shall not be abated by an action commenced between the same parties in relation to the same subject, in the same or any other court." (16 Mass. 170.)

The case of *Home Insurance Company v. Howell*, in the court of chancery of New Jersey, presents some features similar to the case at bar. The complainant filed its bill for relief against two policies of insurance, which it alleged the defendant had fraudulently obtained from it upon his property in Illinois. The bill prayed that the policies might be delivered up and canceled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or equity upon them, or making use of them in any way for the purpose of establishing any claim or damage against the complainant. The defendant appeared and filed an answer, to which a replication being made, proofs were taken. After the suit was commenced the defendant brought an action at law upon the policies against the company in a state court of Illinois, which suit was on its petition removed into the circuit court of the United States for the northern district of Illinois. The company thereupon filed its petition in the court of New Jersey for an injunction to restrain him from prosecuting the suit in Illinois. An injunction having been issued, a motion was made to dissolve it. In denying the motion, the chancellor said: "This court having the power to hear and determine the subject-matter in controversy, and *having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it.* The general rule is, that as between courts of concurrent and co-ordinate jurisdiction (and the circuit court of the United States and the state courts are such in certain controversies—such as that involved in this suit, for example—between citizens of different states), the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court. . . . Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of

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his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and of course from prosecuting one commenced *after* the bringing of the suit in this court." (24 N. J. Eq. 239.)

In *Brooks v. Delaplaine*, the high court of chancery of Maryland dismissed a bill in equity because at the time it was filed a suit involving the same controversy was pending in the county court having concurrent jurisdiction, the chancellor saying: "When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons. . . . Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results." (1 Md. Ch. 354.)

Similar decisions might be cited from the highest courts of nearly every state, for upon the principle stated there is, with certain well recognized exceptions, a general concurrence of opinion.

Where two judgments relating to the same subject are irreconcilable, both cannot be enforced. One or the other must give way; and the only reasonable test by which the superiority of one over the other is to be determined, is that which is expressed in the authorities cited, that the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority. If the time of the rendition of the judgment independently of the commencement of the suit were to be the test, the superiority of judgment, as counsel well observe, would depend on mere accident, or circumstances beyond the power of the court or parties, as one court may have a large calendar and be blocked up with business, creating great delay in the disposition of causes, while the other court may have few causes, and

those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter court pre-eminence because it is enabled from paucity of cases to dispose of its calendar at an earlier day, and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective courts of their preference.

The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred, and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: *First*, where the same plaintiff has asked in the different suits a determination of the same matter; as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudulent and illegal, and therefore vitiating the several obligations; or, where the jurisdiction of a court of equity as well as a court of law is invoked by him with reference to the matter. Of course a decision first rendered in either suit may be pleaded in the others—the plaintiff must abide the adjudication which he has sought; and *second*, where the cases are upon contracts or obligations which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.

The cases of *Duffy v. Lytle*, 5 Watts, 120; *Rogers v. Odell*, 39 N. H. 452; *Child v. Powder Works*, 45 N. H. 547; *Bank of U. S. v. Merchants' Bank*, 7 Gill, 415; and *Wescott v. Edmunds*, 68 Pa. St. 34, fall under one or the other of these classes. The language quoted from *Buck v. Colbath*, 3 Wall. 345, was used as explanatory of the general doctrine that in examining into the exclusive character of the jurisdiction of a court, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. The illustration given of a party suing in a court of chancery to foreclose his mortgage, and in a court of law to recover judgment on his notes, and in another court of law in an action of ejectment to recover the possession of the land, would have brought the supposed case, if a real one, under the first class of exceptions stated above, where a decree first rendered in either suit upon the same point could have been

pleaded as conclusive in the others. In the *Tubal Cain Case*, 9 Fed. Rep. 834, the judgment of the state court pleaded in the United States district court was recovered in the prior action, and the circuit court stayed its proceedings to await the determination of an appeal from the judgment. The other authorities cited do not seem to us, after careful consideration, to be entitled to any weight upon the question presented.

The case at bar is not within either of the excepted classes. The plaintiff has not invoked the jurisdiction of the state court; and the alleged marriage contract is not one which in any sense of the rule was merged, or could be merged, in the judgment, any more than a deed, upon which title to real estate is asserted, is merged in a judgment in ejectment for the possession of the property. It was as much an outstanding and existing contract after the judgment of the state court as before, and was equally available for all purposes. But aside from this, the doctrine of the excepted cases can have no application to cases instituted in a federal court by a citizen of another state, so as to give paramount authority to a judgment of a state court in a suit subsequently commenced against him, without defeating a most important right conferred upon him by the constitution and laws of the United States, a result which can in no manner be accomplished either directly or indirectly. (See *Suydam v. Broadnax*, 14 Peters, 67, and *Payne v. Hook*, 7 Wall. 430.)

It is true that in the decision of the case Judge DEADY expressed his opinion to the effect that as the validity and genuineness of the declaration of marriage were invoked in the state court, its determination would be conclusive, and estop the plaintiff in this court to show the contrary, if it had not been obviated by the appeal from the judgment. We do not concur with the learned judge in this view, for reasons already stated; but assuming it to be sound, we agree with him that the effect of the appeal was to prevent the judgment from becoming final, and to destroy its efficacy as evidence. By the act of Congress the judgment could only have such faith and credit given to it as it has by law or usage in the courts of the state; and by the law of the state its operation as evidence is superseded by an appeal. The Code of Civil Procedure provides that when an

appeal is perfected "it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein," and also that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Such is the express language of the code. (Secs. 946, 1049.) And as the district judge observes, these provisions are in conformity with the law previously existing, according to which an appeal not only stayed the execution of a judgment, but suspended its operation for all purposes. Thus in *Woodbury v. Bowman*, 13 Cal. 634, which was decided before the adoption of the code, the record of a judgment from which an appeal was pending was offered in evidence and rejected, and the court, in affirming the ruling, said: "We think it was properly rejected; the appeal having suspended the operation of the judgment for all purposes, it was not evidence in the questions at issue, even between the parties to it." And in *Murray v. Green*, 64 Cal. 369, decided since the adoption of the code, the record of a judgment in a case then on appeal was offered in evidence and rejected; and the court in sustaining the decision said, that while the appeal was pending "the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties."

The circuit judge did not concur with the district judge as to what would be the effect of the judgment in the state court, if it were final, observing that it was unnecessary to determine that question, and that he reserved his opinion upon it until it should properly arise for judicial determination, and until an opportunity was had for its full discussion and mature consideration. But the circuit judge did concur with the district judge as to the effect of the appeal in destroying the judgment of the state court as evidence of any kind in the federal court. It was of no avail, therefore, when pleaded as an estoppel; it was not evidence of the truth of the matters found, much less conclusive evidence. The ruling of the circuit court in refusing its consideration was therefore correct at the time; and if correct then, it could not become erroneous by any subsequent event. The affirmance

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of the judgment since has no retroactive operation so as to make that ruling bad which was then sound. But more than this, there is still pending an appeal to the supreme court from an order refusing a new trial in the state court. The judgment therein has not, therefore, even yet become final; it does not yet establish as between the parties the verity of the findings. In the recent case of *Gillmore v. Central Ins. Co.*, in the supreme court of this state (65 Cal. 65, 66), the effect of a pending motion for a new trial upon the finality of a judgment was considered. There a stipulation had been made that all proceedings should be stayed until *final judgment and decision* in another action. It was contended that the judgment in that action had become final within the meaning of the stipulation after a year had elapsed from its entry without an appeal being taken from it. There was pending a motion for a new trial, and the court said: "Although no appeal had been taken from the judgment within the statutory time, proceedings were pending, upon a motion made by the defendant in the case, to vacate the judgment and grant a new trial. That motion subjected the judgment to be reviewed, and made it liable to be set aside. The judgment was therefore not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for a new trial had been disposed of. (*Hills v. Sherwood*, 33 Cal. 474.) While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended, and until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it has become final for the purpose of an appeal from it." (See, also, *Fulton v. Hanna*, 40 Cal. 278.)*

It remains to consider the further objections of the defendants that the priority of jurisdiction of the federal court was waived by the stipulation to remand the case originally commenced in the state court from the federal court, to which it had

* Nearly a year after this opinion was delivered, the supreme court of California reversed the order of the superior court denying the new trial, and remanded the case to that court for a new trial. In executing that mandate the judgment of affirmance mentioned was set aside. (*Sharon v. Sharon*, 79 Cal. 683.)

been removed, back to the state court; that the failure to present to the state court the judgment of the federal court was an abandonment of its protection; and that the execution of the decree in the federal court by injunction against prosecuting proceedings under the judgment of the state court is forbidden by the act of Congress prohibiting the issue of an injunction to stay proceedings in a state court except in cases of bankruptcy. (Rev. Stats. sec. 720.)

The alleged waiver of priority of jurisdiction by the federal court because of the consent of parties to remand the case commenced in the state court back to it, after its removal, was considered on the argument in the original suit, and held to be without force. A statement of the circumstances of the remanding is sufficient answer to the position. The case commenced in the state court by the alleged wife, Sarah Althea, against Sharon, praying that her alleged marriage be declared legal and valid, and then that a divorce be decreed, was removed on the application of the defendant therein to the federal court on the supposition that he had a right to have it heard there. The plaintiff therein denied that right, on the ground that the subject-matter being an action for a divorce was not within the jurisdiction of the court, and moved to remand it back to the state court. The defendant's counsel appears to have come to the conclusion that her motion would be granted, and instead of waiting for the order of the federal court to that effect, consented that the case might be remanded—and that is all there is of the alleged waiver. The consent waived no rights of priority by the original suit; nor in any respect affected its position. It would be strange if the remanding of one action by consent should change or affect in any degree the jurisdiction of the court over another and different action, to which the consent made no reference.

The position that the protection of the decree of the federal court was waived because the attention of the state court was not called to it, either on the motion for a new trial or on the argument of the appeal in the supreme court, merits careful consideration. There is not, and certainly ought not to be, anything so unseemly as rivalry and contention between the courts of the state and courts of the United States. Both have large and

responsible duties in the administration of justice for the American people, and we are sure that neither has any desire to encroach upon the jurisdiction and rightful authority of the other. And yet as both courts have on many subjects concurrent jurisdiction, it will sometimes happen that there will be a conflict of decision between them, and then a proper respect for each other will induce both to seek a solution consistent with the just rights of the parties. We think, therefore, it would have been a proper proceeding for the plaintiff in the original suit—the defendant in the state court—to have called the attention of that court, and of the supreme court of the state, in some formal way to the decision and decree of the federal court—not for the purpose of changing any alleged rulings had in the state courts, but in order to secure a stay therein of all further proceedings in them. The whole controversy in the state court rested upon the alleged validity of the marriage contract, and this fact is fully set forth in its findings. The decree in the federal court adjudged that contract to be a forgery, and ordered its surrender and cancellation. If this decree be a final one, and the court had jurisdiction to render it, there can be no doubt that it should, when presented to the state courts, stay all proceedings therein. Those courts would only be called upon to give full faith and credit to it, not to reverse or review any of their rulings, but to act upon a fact, conclusive of the case, for the first time brought to their attention. They would only be called upon to do what they would do upon official notice to them of any other fact which would conclude a pending controversy. If, for example, there should be brought to a *nisi prius* court after a conviction of an accused party of murder, or before the supreme court of the state on appeal from the judgment, official notice that the convict had been pardoned subsequent to the conviction, the *nisi prius* court would not thereupon grant a new trial, or the supreme court reverse the judgment, but both courts might properly be called upon to stay all proceedings upon the conviction—and an order to that effect, reciting the pardon, might be made. So, too, if whilst argument is going on upon the appeal, the supposed murdered man should walk into court and present himself, I think the court, though it

might find no error in the ruling of the lower court, would readily find a way to stay execution of the judgment, upon reciting the personal appearance of the supposed murdered man. So we think the decree of the federal court might have been officially presented to the state courts, and a stay of proceedings in the action there asked. But it was not obligatory upon the defendant in the state courts to present to them the federal decree. He might think proper to await the final action of those courts, and if the judgment of the superior court should be ultimately sustained, present the federal decree to stay its enforcement. He might very well have deemed it wise to wait until the time to appeal from the federal decree had expired before calling upon the state courts to give effect to it in proceedings before them. The time to appeal did not expire until the 15th of January, 1888, after the motion for a new trial had been heard in the lower court, and the appeal had been heard and submitted in the supreme court. The decree was entered as of September 29, 1885, and was as effectual for all purposes as if it had been announced on that day, except where the rights of others may have been prejudiced thereby; and to prevent such prejudice in shortening the time to appeal, it must be deemed to have commenced running only from the date of its actual entry.

There was no effective appeal from the decree in the federal court taken during the statutory period. There was an attempt by the defendant to appeal, and an order was made allowing an appeal, but as this was before the case was revived the order was improvidently made and was without any efficacy. Where a suit has abated by the death of the plaintiff after judgment, no appeal can be taken by the defendant until the case is revived. (*McClane v. Boon*, 6 Wall. 244.)

The decree of the federal court when revived may be used to stay any attempted enforcement of the judgment of the state court. The case of *Boymton v. Ball*, 121 U. S. 462, is illustrative of this doctrine, and has a direct bearing upon the question. There a party who had filed a petition for the benefit of the bankrupt law was sued for a debt in a state court of Illinois. Although he could have applied, under the act of Congress, to the state court for a stay of proceedings until the disposition of

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his petition in bankruptcy, he made no application of the kind, and judgment passed against him there. When he subsequently obtained his discharge in bankruptcy, he presented it to that court and moved for a perpetual stay of execution on its judgment. The motion was denied, and the supreme court of the state affirmed the ruling. The case was then taken on writ of error to the supreme court of the United States, where the judgment of the supreme court of Illinois was reversed. After citing the section of the bankrupt act giving the right of the party to stay proceedings in the state courts, the supreme court of the United States said: "The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the second place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid *pro rata* with his other debts by the assignee in bankruptcy. If, for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do (*Hill v. Harding*, 107 U. S. 631), he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution which he asks for now."

The failure to present the decree to the state courts did not, therefore, in our opinion, lessen its efficacy, and will not prevent

it when revived from being hereafter presented to them, and does not impair in any respect the power of this court to enforce its execution.

The prohibition against the issue of an injunction by a court of the United States to stay proceedings in a state court is found in section 5 of the act of March 2, 1793 (1 Stats. 334), and has been continued in force ever since. It is now contained in section 720 of the Revised Statutes, with an exception relating to proceedings in bankruptcy, and is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Notwithstanding the very general terms of the prohibition, with the single exception mentioned, it has been settled that it does not apply where the federal court has first obtained jurisdiction, or where the state court having first obtained jurisdiction the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction of the state court has first attached; with its proceedings then no federal court can interfere by injunction.

In *Fisk v. The Union Pacific Railroad Co.* 10 Blatchf. 520, the circuit court of the United States for the southern district of New York issued an injunction restraining that corporation from taking any steps in a state court to procure its own dissolution, and the effect of the statute in question was considered. Judge Blatchford, now one of the justices of the supreme court, in deciding the case, said: "The provision of section 5 of the act of March 2, 1793 (1 U. S. Stats. at Large, 334, 335), that a writ of injunction shall not be granted to stay proceedings in any court of a state, has never been held to have, and cannot properly be construed to have any application except to proceedings commenced in a court of a state *before* the proceedings are commenced in a federal court. Otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full juris-

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fiction of person and subject-matter. Moreover, the provision of the act of 1793 must be construed in connection with the provision of section 14 of the act of September 24, 1789 (1 U. S. Stats. at Large, 81, 82), that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. It may properly be considered as necessary for the continued exercise of the jurisdiction of this court over the corporation in question, that it should be restrained from taking steps, in a state court, to put itself out of existence."

In *Wagner v. Drake*, in the circuit court of the United States for the district of Iowa (31 Fed. Rep. 851), the question raised was as to the power of the court to restrain proceedings in a state court, after the action had been removed to it, and though it was held that the facts of the particular case did not authorize the injunction, the power of the federal court to restrain such proceedings, where irreparable injury would follow a refusal of the writ, was fully recognized. In deciding the case, the court said: "An injunction in such case by the federal court restraining the parties before it from proceeding elsewhere is no injunction, within the spirit and intent of the statute staying proceedings in a state court, because after removal there is no proceeding left in the state court, and no jurisdiction to be interfered with. If, after removal, a party could continue or renew his litigation in the state court, the whole purpose of the removal might be defeated."

The doctrine of these cases has been affirmed by the supreme court of the United States. In *French, Trustee, v. Hay*, 22 Wall. 250, that court held that the circuit court of the United States for the eastern district of Virginia rightfully enjoined proceedings in a suit in a court of Pennsylvania, founded upon a decree rendered in a suit in a court of Virginia, which had been properly removed to the circuit court. In deciding the case, the supreme court, speaking by Mr. Justice Swayne, said: "The prohibition in the judiciary act against the granting of injunctions by the courts of the United States, touching proceedings in state courts, has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

In *Dietzsch v. Huidzkoper*, 103 U. S. 494, it appeared that an action of replevin had been commenced in a state court of Illinois, which was removed to the circuit court of the United States for that district. Notwithstanding the removal, a writ for the return of the property was issued by the state court, which the plaintiffs in the replevin suit refused to obey. An action was then brought against them and their sureties on the replevin bond. They thereupon filed a bill in the United States circuit court, in which they prayed an injunction to restrain the prosecution of any suit upon the bond. An injunction was issued, and the supreme court held that it was properly granted, observing that "a court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court."

It is essential to the due administration of justice in the federal courts that they have full power to issue all process necessary for the exercise of their jurisdiction, and such power is in explicit terms conferred by statute upon them. When, therefore, jurisdiction over a subject-matter has first attached in a federal court, it must be able to issue all such orders and process as may be essential to give effect to that jurisdiction. State courts subsequently taking jurisdiction over the same subject must exercise it in subordination to the determination of the federal court.

We have thus gone over, with as much care as we have been able to give, the several objections of counsel to the jurisdiction of the circuit court of the United States to render the decree in the original suit of *Sharon v. Hill*; and we have no doubt of its complete and paramount jurisdiction over the subject-matter of the suit, and to render the decree entered. That decree was reached after an exhaustive examination of the proofs in the case as shown by the elaborate opinions of the judges. Although there are some doctrines announced in the leading opinion to which we do not assent, and to one of which we have already referred, no one, we think, with a clear judgment, unaffected by passion, can read and study its masterly analysis and presentation of the testimony without being convinced that the court

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had abundant reasons for its conclusions. The learned counsel for the defendants for once, contrary to his general habit, has been led by his zeal beyond the limits of proper discussion in declaring to the court which rendered the decree that it is "an ineffective, inoperative, unenforceable pronouncement." Being upon the matters embraced by it, in our judgment, binding and conclusive, it must be enforced in all its parts until the only tribunal in this country which can control and stay it—the supreme court of the United States—has determined otherwise. That tribunal is lifted far above all prejudices, passions, and attachments, and will adjudge without any such influences what is just and right in the controversy, so far as that is attainable in our system of government.

We have endeavored to discuss the questions presented purely as legal questions, without reference to or comment upon the evidence in the cases; yet as counsel have referred to the different manner in which the testimony was given in the two courts—that in the state court by the witnesses in open court, and that in the federal court by depositions before an examiner in chancery—as though for this reason the conclusions of the state court were entitled to greater consideration than those of the federal court: we have read with care the opinion of the state court. The testimony is such that weight is to be attached to it more from its character and intrinsic nature than from the manner in which it was given. The great question in both was the genuineness of the alleged marriage contract—the holder, Sarah Althea, affirming its genuineness, and the alleged signer, William Sharon, asseverating its forgery. Both have accompanied their statements with their oaths. Both have not testified to the truth; there is falsehood on one side or the other. The burden of proof was on her, and the learned judge of the state court often speaks of testimony offered by her in terms of condemnation. In one passage he says of certain testimony given by her: "This is unimportant, except that it shows a disposition which crops out occasionally in her testimony to misstate or deny facts when she deems it of advantage to her case." Again, with respect to alleged introductions of her to several persons as the wife of Sharon, the judge says: "Plaint-

iff's testimony as to these occasions is directly contradicted; and in my judgment her testimony as to these matters is wilfully false." As to her testimony that she advanced to Sharon in the early part of her acquaintance seven thousand five hundred dollars, the judge says: "This claim, in my judgment, is utterly unfounded. No such advance was ever made." Again, the court said: "The plaintiff claims that the defendant wrote her notes at different times after her expulsion from the Grand Hotel. If such notes were written, it seems strange that they have not been preserved and produced in evidence. I do not believe she received any such notes." Again, a document purporting to be signed by Sharon was produced by her, explaining why she was sent from the Grand Hotel in the fall of 1881, and also acknowledging that the money he was then paying her was part of seven thousand five hundred dollars she had placed in his hands. The production of the paper for inspection was vigorously resisted, but it was finally produced. At a subsequent period, when called for it could not be found. Of this paper the judge said: "Among the objections suggested to this paper as appearing on its face was one made by counsel that the signature was evidently a forgery. The matters recited in the paper are, in my judgment, at variance with the facts which it purports to recite. Considering the stubborn manner in which the production of this paper was at first resisted, and the mysterious manner of its disappearance, I am inclined to regard it in the light of one of the fabrications constructed for the purpose of bolstering up plaintiff's case. I can view the paper in no other light than as a fabrication."

There are several other equally significant and pointed passages expressive of the character of the testimony produced in support of her case. Of what she attempted, the judge thus speaks: "I am of the opinion that to some extent plaintiff has availed herself of the aid of false testimony for the purpose of giving her case a better appearance in the eyes of the court; but sometimes parties have been known to resort to false testimony, where, in their judgment, it would assist them in prosecuting a lawful claim. As I understand the facts of this case, that was done in this instance." Notwithstanding this characterization

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of parts of her testimony, the genuineness of the alleged marriage contract rests, to a great extent, upon her testimony. It would seem that the learned judge reached his conclusions without due regard to a principle in the weighing of testimony, as old as the hills, and which ought to be as eternal in the administration of justice, that the presentation knowingly of fabricated papers, or false evidence, to sustain the story of a party, throws discredit upon his whole statement. It is generally deemed equivalent to an admission of the falsity of the whole claim. (*Deering v. Metcalf*, 74 N. Y. 501, 506; *Chicago City Railway Co. v. McMahon*, 103 Ill. 485; *Egan v. Bowker*, 5 Allen, 449; Code Civ. Proc. sec. 2061; Starkie on Evidence, p. 873.)

We have referred to the opinion of the state judge merely on account of the claim that his conclusions, because he had the witness before him, and because of the alleged defective machinery for taking testimony in the federal courts, are entitled to more consideration than the opposite conclusions reached by the federal judges after a most thorough and exhaustive examination.

The judgment of this court is that the demurrers in both cases be overruled; that in the first case the original suit of William Sharon against Sarah Althea Hill, now Sarah Althea Terry, and the proceedings and final decree therein, stand revived in the name of Frederick W. Sharon as executor, and against Sarah Althea Terry and David S. Terry, her husband—the said executor being substituted as plaintiff in the place of William Sharon, deceased, and the said David S. Terry being joined as defendant with his wife, so as to give to the said plaintiff, executor as aforesaid, the full benefit, rights, and protection of said final decree, and full power to enforce the same against the said defendants at all times, and in all places, and in all particulars. In the second case, that of Francis G. Newlands, trustee, and others, beneficiaries under the trust deed, the defendants will have leave to answer until the next rule day.

Appropriate orders in conformity with this decision will be entered in the respective cases.

From the decree entered in the first of these cases, *Sharon v. Terry and Wife*, an appeal was taken by the defendants to the

supreme court of the United States. The appeal was allowed on the 9th of November, 1888, by the circuit court, but without any stay of proceedings upon the decree appealed from. In the supreme court, a motion was made on the eighth day of April, 1889, to dismiss the appeal for want of jurisdiction, because the order or decree appealed from was not a final decree, or, if that were untenable, to affirm the decree on the ground of the frivolousness of the appeal. On the 13th of May, 1889, the court denied the motion to dismiss the appeal, but affirmed the decree for the frivolousness of the grounds on which the appeal was taken. The following is the opinion of the supreme court on rendering its decision, which was delivered by Mr. Justice Miller (131 U. S. 40):—

MILLER, J. This is an appeal from the circuit court of the United States for the northern district of California, and is now before us upon a motion on the part of the appellee to dismiss the appeal or to affirm the decree below.

The appeal, which was the subject of this dual motion, is from an order of the circuit court reviving a suit in equity after a final decree in the case had been made, and after the death of William Sharon, the plaintiff in that suit. Sharon died after the case had been submitted to the court but before its decision, and the court, finding in his favor, ordered the decree to be entered *nunc pro tunc*, as of the date of submission. The object of the original suit was to have a decree, declaring the nullity and invalidity of a certain instrument in writing purporting to be a declaration of marriage between the complainant, William Sharon, and Sarah Althea Hill, the defendant. The decree which was rendered in that case declared that said instrument was false, fabricated, forged, fraudulent, and utterly null and void, and directed that it be canceled and set aside. It further decreed, that upon twenty days' notice of the decree to the respondent, or to her solicitors, the instrument be delivered by the respondent to and deposited with the clerk of the court, to be indorsed canceled; and the defendant was perpetually enjoined from alleging its genuineness or validity, or making any use of the same in evidence, or otherwise, to support any right or claim under it. The

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decree itself was rendered on November 23, 1885, and was entered as of September 29th of that year, the date of submission.

On March 12, 1888, Frederick W. Sharon, as executor of William Sharon, deceased, filed his bill of revivor in the cause, setting forth the fact of the death of William Sharon, and that he left a will, which was duly probated, and on which letters testamentary had issued to him as executor; that the so-called declaration of marriage had not been delivered for cancellation, as ordered by the decree; and that the plaintiff feared the defendant would claim and seek to enforce property rights as the wife of William Sharon, by virtue of said written declaration of marriage. The bill of revivor further stated that on January 7, 1885, the defendant, Sarah Althea Hill, had intermarried with David S. Terry, and he was accordingly made a defendant with her to the bill of revivor. It prayed, therefore, that the suit might be revived in his name as executor, and that the defendants be required to show cause why the original suit and proceedings should not stand revived against them.

To this bill of revivor the defendants interposed a demurrer, which stated, among other things, that the court had no jurisdiction of the subject-matter of the suit, and no jurisdiction to grant the relief prayed for in the bill, or any part thereof, and that the bill did not contain any matter of equity whereon the court could ground any decree or give to the plaintiff any relief against the defendants, or either of them.

The circuit court entered an order overruling the demurrer, and reviving the suit in the name of Frederick W. Sharon, as executor of William Sharon, and against Sarah Althea Terry and David S. Terry, her husband, and ordering that the executor have the full benefit, rights, and protection of the decree, and full power to enforce the same against the defendants, and each of them, in all particulars. It is from this order that the present appeal is taken.

The motion to dismiss the appeal is based upon the proposition that the order reviving the suit is not such a final order or decree as can be brought to this court for review. The principal argument on that subject is, that like the proceedings subsequent to a judgment at law for its enforcement by execution or

otherwise, it is merely ancillary to the original decree, and a mode of carrying it into effect. But we are not satisfied that this is a sound argument, and if the case before us rested alone upon the question of dismissing the appeal, or overruling the motion to do so, we should feel compelled to overrule the motion.

The idea cannot be sustained that when a judgment or decree is rendered against a defendant, and it remains wholly unexecuted, *anybody*, without any right, authority, or interest in the matter, can come in, and, by filing a bill of revivor, or by making a motion, have himself substituted for the plaintiff who has deceased, with all the rights which that plaintiff would have had to enforce the judgment or decree. Two questions must always present themselves in such a case, or at least may be presented; the one is, whether the decree is in condition that any further action can be had, or any right asserted under it by those who succeed the plaintiff as heirs, devisees, executors, or otherwise; and the other is, whether the party who thus asserts the right to the benefit of the decree is entitled to such right, and is by law the person who can claim its enforcement, or should, in any action or matter arising out of the decree, represent the rights of the original plaintiff. Both of these questions are matters which interest the defendant in the original decree, and in regard to which he must have a right to a hearing before the circuit court; and the order of the circuit court on that subject is so far final, and may so far affect the rights of the defendant, that we think he is entitled to an appeal from such an order, if, in other respects, it is one within the jurisdiction of the supreme court. If the defendant had not this right of resistance, he might be harassed by suits to revive the judgment by any number of parties claiming in different or opposing rights, and he surely must have some power to protect himself from this; and the order which the court makes in such a case is so essentially decisive and important that we do not doubt that it is appealable. The motion, therefore, to dismiss the appeal must be overruled.

Turning to the alternative branch of this motion, which claims that the order of the court, reviving the suit in the name of Frederick W. Sharon, executor, should be affirmed, because the

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appeal is frivolous and unwarranted by the facts of the case, we think it should be granted. This order does no more than place before the court in connection with the case a person occupying the position of plaintiff in that suit in the place of the deceased complainant, with such authority to avail himself of all the rights determined in favor of Sharon by the original decree as may be essential to the protection of the estate of Sharon, or the interests of his heirs or devisees, as they may be affected by that decree. That some one should be substituted in the place of Sharon, the complainant in that suit, who should be able to obtain the fruits of that litigation for the benefit of those who may be entitled to them, is so much a matter of course that it is difficult to conceive of a reason why such a substitution, through a bill of revivor, the usual proceeding in chancery cases, should not be had. If any objection had been made to the character in which Frederick W. Sharon asked to be made the representative of his father, to his fitness for the place, or that some one else was the proper person in whose name the suit should be revived, there might be some ground for a full hearing on the merits of the order. But no attempt is made to dispute the will of William Sharon, the disposition which it makes of his property or rights, or the validity of the appointment of Frederick W. Sharon, as executor of that will. There is no pretense, and there was no effort to show in the court below, that if the suit should be revived at all in the name of any person whatever, Frederick W. Sharon was not that person.

The broad ground taken, the only one worthy of consideration, and the one argued with great earnestness in the brief of counsel for appellants, is that the court which rendered the original decree was without jurisdiction; and that on the motion to revive, that question should be considered, and if the court was without jurisdiction in the original case, it can have no jurisdiction to appoint an executor. This matter is very fully argued in the briefs of counsel, and it is the only point made in opposition to the motion to affirm*the judgment below. We have given it full consideration, and because it is the only point, and because it has been fully and ably argued, we have the less reluctance in passing in this mode upon the merits of the order

reviving the suit. We are satisfied that a later, and even more full, oral argument would throw no additional light upon the subject we are called upon to consider.

It would be a very anomalous proceeding for this court now, on the mere review of the order reviving the suit, and appointing a new party to conduct it on the part of the plaintiff, to go back and decide upon the whole question which was passed upon by the circuit court in the original decree. That decree was open to appeal when it was rendered. If the defendant Hill was dissatisfied with it, or believed it was erroneous, or made without jurisdiction, she had the right to appeal to this court. It was not only open to her, but it was the proper remedy if she desired to test it further. The order substituting the executor as plaintiff in that suit grants no new rights, does not enlarge that decree, and does not change its status, its construction, or its validity. All the rights which she would have had against William Sharon, the plaintiff in that suit, she has against Frederick W. Sharon, who is substituted for him in the case. It would be productive of innumerable evils and delays if, on this proceeding to supply the defect in the original suit arising out of the death of the plaintiff, everything that had been done in that suit, although there was a final decree in the case, should be reconsidered and become the subject of renewed litigation.

If the jurisdiction of the circuit court in the original suit were in any respect open to question on this appeal, or on this motion, we think that the record below presents so much of the elements of jurisdiction as to need no further inquiry in that direction *in this proceeding*. It appears by the record that Sharon, the plaintiff in that suit, describes himself as a citizen of the state of Nevada, and the defendant Hill, as a citizen of the state of California. This is sufficient to have given jurisdiction of the parties, and the object of the suit, the cancellation of a forged instrument, is one of the common heads of equity jurisdiction. A general demurrer was filed to the bill, which the circuit court overruled. The defendant then pleaded in abatement that she had brought an action against the plaintiff in the state court of California, which she alleged involved the same matter as that on which Sharon's bill against her was founded. She also, as a

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further proposition in that plea, alleged that Sharon, the plaintiff, was not a citizen of the state of Nevada, but was a citizen of the state of California. This plea, in both its branches, was denied by Sharon, and, on a hearing, it was held to be bad and overruled, as the court said in its decision, because no testimony was taken to support it. Thus it appears that this matter of the jurisdiction of the circuit court was pleaded and relied on in that suit, and the court overruled it.

We have not made this reference to the proceedings in the court below with a view of reconsidering the soundness of those decisions. It is sufficient to say that, as presented to us, it is at least a *prima facie* case of jurisdiction as between the parties, and that the question of the soundness and correctness of the decision of that court on the merits cannot be inquired into in the present proceeding.

Let us suppose for a moment that the circuit court was at liberty to make an order reviving this decree in the name of a proper person, and it had refused to do so. Whatever injury had been committed by the circuit court against Mr. Sharon could not, on the theory of the appellants, be reviewed in this court, because there would be no party to take an appeal, and even the error of the court, in holding that it had no jurisdiction, could not be reviewed for want of somebody to do so. Especially would this be so if the doctrine insisted on by the appellee be sound, that the order is not an appealable order.

On the other hand, let it be supposed that the defendant Hill in that suit desired to take an appeal, as she had a right to do, from the decree against her, she could only take such an appeal and prosecute it by reviving the suit against some party who must represent the Sharon interest.

The objection that the original suit and decree were without jurisdiction would be as valid against an application by Miss Hill to have some one substituted as plaintiff, in order that she might take an appeal, as it can be in the case of the present application by the plaintiff below. It is, we think, too clear for any serious argument that the representatives of Sharon had a right to supply the defect in the suit, created by the death of the plaintiff, by a bill of revivor, substituting a party in the place of Sharon.

Points decided.

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It is averred in this bill of revivor that the decree has not been complied with by the defendant Hill; that she has not delivered up the instrument to be canceled; and that she is using it in other ways to the prejudice of Sharon's estate and that of his devisees. Somebody capable of putting the decree into effect in those particulars is essential to its utility and to its execution.

We have not been able to find any precedent exactly representing the case before us. The ingenuity of counsel has been unable to supply us with any; but we think the decree of the court below, reviving the suit in the name of Frederick W. Sharon, is so clearly right that we feel bound to affirm that decree on this motion.

Mr. Justice FIELD took no part in the decision of this case.

THE TERRY CONTEMPT CASE.

IN THE MATTER OF THE CONTEMPT OF DAVID S. TERRY.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 17, 1888.

1. CONTEMPT—PUNISHMENT—IMPRISONMENT—REMISSION. —The petitioner and his wife were present in court, of which he was an attorney, during the reading of an opinion in the cause to which they were parties; and the latter rising interrupted the presiding justice, and charged him with having been bribed to render the decision. She refusing to be seated the marshal, under order of the court, attempted to remove her from the court-room, when the petitioner struck him a severe blow in the face. Both she and the petitioner resisted her removal, using profane, opprobrious, and threatening language towards court, officers, and those assisting, and were only overcome by force. The petitioner attempted to draw a bowie-knife immediately after striking the marshal, and as he was going out of the court-room succeeded in drawing it, and in the corridor adjoining brandished it, with threats, until it was forcibly taken from him. His wife also had a loaded pistol in her satchel. He was sentenced to six months' imprisonment for contempt, and, after a few days, presented a petition to the court for a revocation of the order of commitment, which stated that he did not intend to say or do anything disrespectful to the court or any of its judges, and attempted a justification, but misstated the facts, as known to the court and set forth in the affidavits of others present, and expressed no regret for his acts. *Held*, that the order should not be remitted; that the forcible resistance to an officer of the United States in the execution of the lawful orders of their courts was an indignity and insult to the power and authority of the government, which were not extenuated by any averment that no disrespect was intended to the courts making the orders.

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Statement of Facts.

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge.

On September 3, 1888, while the judges of the United States circuit court, holden at San Francisco, were delivering their opinion in the cases of Frederick W. Sharon against David S. Terry and wife, and Francis G. Newlands and others against the same defendants (reported *ante*, page 387) Mrs. Terry, one of the defendants, interrupted Mr. Justice FIELD, who was reading the opinion, and was guilty of such misbehavior in the presence of the court that the marshal was ordered by the court to remove her from the court-room. The marshal proceeded to execute this order, when he was assaulted and beaten, in the presence of the court, by Terry, who at the same time thrust his right hand under his vest, where he had a bowie-knife concealed on his person, apparently for the purpose of drawing it, when the deputy marshals and citizens present promptly laid hold of him, and restrained further violence until Mrs. Terry was taken from the court-room. When this was done, Terry was allowed to leave the court-room, and was accompanied by officers to the door leading to the adjoining corridor. As he was about leaving the room, he drew a bowie-knife from his bosom, and as he stepped into the corridor he brandished it, with threats of violence against those who opposed his going to his wife, when he was again seized by deputy marshals and others, and in the struggle ensuing his knife was taken from him. The judges holding the court were STEPHEN J. FIELD, Circuit Justice, LORENZO SAWYER, Circuit Judge, and GEORGE M. SABIN, District Judge. Judge HOFFMAN was present, sitting with the judges, but merely as a spectator. As soon as the disturbance had ceased, Justice FIELD proceeded with the reading of the opinion, after which orders were made by the court adjudging Mr. and Mrs. Terry guilty of contempt, and directing their imprisonment as a punishment therefor.

The marshal arrested the parties for their disturbance and resistance to the enforcement of the order of the court, and they remained in custody in his office until the orders of commitment for contempt were made, after which they were held under those orders, which are as follows:—

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ORDER COMMITTING D. S. TERRY FOR CONTEMPT.

At a stated term, to wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the third day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Present—The Honorable STEPHEN J. FIELD, Associate Justice of the Supreme Court of the United States; the Honorable LORENZO SAWYER, Circuit Judge; the Honorable GEORGE M. SABIN, United States District Judge, District of Nevada.

IN THE MATTER OF CONTEMPT }
OF DAVID S. TERRY. }

Whereas, on this third day of September, 1888, in open court, and in the presence of the judges thereof, to wit, Hon. STEPHEN J. FIELD, Circuit Justice, presiding; Hon. LORENZO SAWYER, Circuit Judge, and Hon. GEORGE M. SABIN, District Judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining causes pending before it, one Sarah Althea Terry was guilty of misbehavior in the presence and hearing of said court; and whereas, said court thereupon duly and lawfully ordered the United States marshal, J. C. Franks, who was then present, to remove the said Sarah Althea Terry from the court-room; and whereas, the said United States marshal then and there attempted to enforce said order, and then and there was resisted by one David S. Terry, an attorney of this court, who, while the said marshal was attempting to execute said order, in the presence of the court, assaulted the said United States marshal, and then and there beat him, the said marshal, and then and there wrongfully and unlawfully assaulted said marshal with a deadly weapon, with intent to obstruct the administration of justice and to resist such United States marshal, and the execution of the said order; and whereas, the said David S. Terry was guilty of a contempt of this court by misbehavior in its presence, and by a forcible resistance in the presence of the court to a lawful order thereof in the manner aforesaid:—

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Now, therefore, be it ordered and adjudged by this court, that the said David S. Terry, by reason of said acts, was and is guilty of contempt of the authority of this court, committed in its presence on this the third day of September, 1888. And it is further ordered that said David S. Terry be punished for said contempt by imprisonment for the term of six months. And it is further ordered that this judgment be executed by imprisonment of the said David S. Terry in the county jail of the county of Alameda, in the state of California, until the further order of this court, but not to exceed said term of six months.

And it is further ordered that a certified copy of this order, under the seal of the court, be process and warrant for executing this order.

ORDER COMMITTING SARAH ALTHEA TERRY FOR CONTEMPT.

At a stated term, to wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the third day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Present—The Honorable STEPHEN J. FIELD, Associate Justice of the Supreme Court of the United States; the Honorable LORENZO SAWYER, Circuit Judge; the Honorable GEORGE M. SABIN, United States District Judge, District of Nevada.

**IN THE MATTER OF THE CONTEMPT }
OF SARAH ALTHEA TERRY. }**

Whereas, on this third day of September, 1888, in open court, and in the presence of the judges thereof, to wit, Hon. STEPHEN J. FIELD, Circuit Justice, presiding; Hon. LORENZO SAWYER, Circuit Judge, and Hon. GEORGE M. SABIN, District Judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining causes pending before it, the said Sarah Althea Terry interrupted the proceedings of said court by loud and boisterous language, and was thereupon by said court ordered to be silent and to take her seat, and refused so to do, but continued to use boisterous and insulting language, and asked the presiding justice "how much

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he was paid for his opinion," and then and there used towards the court and in its presence other contemptuous and scandalous language; and whereas, the said court then and there made an order that the said United States marshal remove the said Sarah Althea Terry from the court-room of said court, which order the said marshal then and there attempted to execute, and which said order made in her presence and hearing, the said Sarah Althea Terry resisted then and there in the presence of the court; and whereas, the said Sarah Althea Terry was thereby guilty of a contempt of this court by misbehavior in its presence, and by a resistance in its presence to a lawful order thereof, and in the manner aforesaid:—

Now, therefore, be it ordered and adjudged by this court that the said Sarah Althea Terry, by reason of the acts aforesaid, was and is guilty of contempt of the authority of this court, committed in its presence on this third day of September, 1888; and it is further ordered that Sarah Althea Terry be punished for said contempt by imprisonment for the term of thirty days; and it is further ordered that this judgment be executed by the imprisonment of the said Sarah Althea Terry in the county jail of the county of Alameda, in said state of California, until the further order of this court, but not to exceed said term of thirty days.

And it is further ordered that a certified copy of this order, under the seal of the court, be the process and warrant for executing this order.

On September 12, 1888, the following petition was presented to the circuit court by Mr. Terry, requesting a revocation of the order committing him to prison:—

PETITION OF D. S. TERRY.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN THE MATTER OF CONTEMPT }
OF DAVID S. TERRY. }

To the Honorable Circuit Court aforesaid.

The petition of David S. Terry respectfully represents:—

That in all the matters and transactions occurring in the said

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court on the third day of September, inst., upon which the order in this matter was based, your petitioner did not intend to say or do anything disrespectful to said court, or to the judges thereof, or to any one of them.

That when petitioner's wife, the said Sarah A. Terry, first arose from her seat and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet, and he did nothing to encourage her in her acts of indiscretion; when this court made the order that petitioner's wife be removed from the court-room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court-room quietly and peaceably, and he had no intention or design of obstructing or preventing the execution of the said order of the court; that he never struck or offered to strike the United States marshal until the said marshal had assaulted himself, and had in his presence violently, and as he believed, unnecessarily assaulted petitioner's wife.

Your petitioner most solemnly avers that he neither drew nor attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not assault or attempt to assault the United States marshal with any deadly weapon in said court-room or elsewhere. And in this connection, he respectfully represents that after he had left said court-room, he heard loud talking in one of the rooms of the United States marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal; the door of this room was blocked with such a crowd of men that the door could not be closed; that your petitioner then for the first time drew from inside his vest a small sheath knife, at the same time saying to those standing in his way in said door that he did not want to hurt any one; that all he wanted was to get in the room where his wife was. The crowd then parted, and your petitioner entered the doorway, and there saw a United States deputy marshal with a revolver in his hand pointed to the ceiling of the room. Some one then said, "Let him in, if he will give up his knife," and your petitioner immediately released hold of the knife to some one standing by.

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In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court, or any of the judges thereof.

That he lost his temper, he respectfully submits was a natural consequence of himself being assaulted when he was making an honest effort to peaceably and quietly enforce the order of the court so as to avoid a scandalous scene, and of his seeing his wife so unnecessarily assaulted in his presence.

Wherefore, your petitioner respectfully requests that this honorable court may in the light of the facts herein stated revoke the order made herein committing him to prison for six months.

And your petitioner will ever pray, etc.

Dated: September 12, 1888.

State of California, County of Alameda—ss.: David S. Terry, being duly sworn, deposes and says, that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

D. S. TERRY.

Subscribed and sworn to before me, this twelfth day of September, 1888.

[SEAL.]

GEORGE M. SHAW, Notary Public.

Indorsed: Filed September 17, 1888.

L. S. B. SAWYER, Clerk.

Affidavits setting forth the occurrences in court at the time of the disturbance were filed soon afterwards by Marshal Franks, deputy marshals Farish, Harris, Taggart, and Presbury, who were in attendance upon the court at the time, and of several other persons who were present and eye-witnesses of the affair. The following are the affidavits of Marshal Franks and of Mr. Finnegass, which set forth the most important circumstances with sufficient fullness. Extracts from some of the others are also given:—

AFFIDAVIT OF MR. FRANKS, THE MARSHAL.

"State of California, City and County of San Francisco—ss.: I, J. C. Franks, being duly sworn, depose and say, that I am and have been since March, 1886, the United States marshal for the northern district of California. That on the third day of September, 1888, I was standing where I usually stand in the court-

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room, on the west side of the railing enclosing the place where the clerk of the court sits. While Judge FIELD was reading his decision in the case of *Sharon v. Terry*, Judge Terry and his wife, Mrs. Terry, sat at the large table for attorneys in front of the railing around the clerk's desk; they being to my left, Mr. Terry being further away from me. Judge FIELD had read for a few minutes, when Mrs. Terry stood up, interrupting the court, said, among other things, 'You have been paid for this decision.' Judge FIELD then ordered her to keep her seat, but she continued, saying, 'How much did Newlands pay you?' Then Judge FIELD, looking towards me, said, 'Mr. Marshal, remove that woman from the court-room.' Mrs. Terry said in a very defiant manner, 'You cannot take me from the court.' I immediately stepped to my left to execute the order, passing Judge Terry, to where Mrs. Terry was standing. Mrs. Terry immediately sprang at me, striking me in my face with both her hands, saying, 'You dirty scrub, you dare not remove me from this court-room.' Mrs. Terry made this assault upon me before I had touched her. I immediately moved to take hold of her when Judge Terry threw himself in my way, getting in front of me, and, unbuttoning his coat, said, in a most defiant and threatening manner, 'No man shall touch my wife; get a written order,' or words to that effect. I put out my hand towards him, saying, 'Judge, stand back; no written order is required;' and just as I was taking hold of Mrs. Terry's arm, Judge Terry assaulted me, striking me a hard blow in my mouth, with his right fist, breaking one of my teeth, and I immediately let his wife go and pushed him back. He then put his right hand in his bosom, while at the same time Deputy Farish, Detective Finnegass, and other citizens, caught him by the arms, and pulled him down in his chair. I caught hold of Mrs. Terry again, Mr. N. R. Harris, one of my deputies, coming to my assistance, and we took her out of the court-room into my office; she resisting, scratching, and striking me all the time, using violent language, denouncing and threatening the judges and myself, claiming that I had stolen her diamonds and bracelets from her wrists, and calling several times to Porter Ashe to give her her satchel; I, during the whole time, using no more force than was

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necessary, considering the resistance made by her, addressing her as politely as possible. When we got her into the inner room of my office, I left her in charge of Mr. Harris, went into the main office, saw a body of men scuffling at the door, heard Deputy Marshal Taggart say, 'If you attempt to come in here with that knife, I will blow your brains out.' I said, 'What, has he a knife?' Deputy Farish answered, and said, 'He had a knife, but we took it away.' I then took hold of Judge Terry, and, with assistance of others, pulled him in the main office, and shut the door. I had him and his wife placed in my private office in charge of deputy marshals Harris, Donnelly, and Taggart. I then went into the court-room, and when I had been in there but a short time, Mr. Farish came in and said, 'Mrs. Terry wants her satchel, which Porter Ashe has.' I went into the corridor, and found Mr. Ashe with the satchel. I requested him to hand it to me. At first he refused, saying it was Mrs. Terry's private property, and he was going to deliver it to her. I told him she was my prisoner, and her effects should be in my custody, and if he did not give the satchel up I would place him under arrest. He then gave it to me, and I told him to come with me into my office, and I would open it in his presence. He did so, and I opened it, and took a pistol therefrom, a self-cocking 41 caliber Colt's pistol, with five chambers loaded, the sixth being empty, after which I delivered the satchel to Mrs. Terry. Mr. Ashe then said he did not intend to give the satchel to her with the pistol in it. I append hereto a photograph of the bowie-knife taken from the hands of Judge Terry by a citizen, with the assistance of my officers, and handed to me by the citizen, and also a photograph of the pistol taken from Mrs. Terry's satchel, both photographs exhibiting the actual size of these weapons. All this occurred in the appraisers' building, corner of Washington and Sansome streets, in the presence of and within the hearing of the United States judges, while they were delivering the decision. I noticed Judge Terry and his wife during the reading of the opinion; and, as some points were being decided against them, I carefully observed them before I commenced to remove Mrs. Terry from the court-room; and there was no word or act that I observed on the part of Judge Terry to restrain his wife in her conduct, or to take

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her from the court-room, or to assist me in doing so. On the contrary, Judge Terry resisted me with violence, as I have stated. After Judge Terry was placed in my inner office, as I have above stated, he used very abusive language concerning the judges, referring to Judge SAWYER as 'that corrupt son of a bitch,' and also saying, 'Tell that bald-headed old son of a bitch, FIELD, that I want to go to lunch;' and after the order was made committing him six months for contempt, Judge Terry said: 'FIELD thinks that when I get out, he will be away; but I will meet him when he comes back next year, and it will not be a very pleasant meeting for him.' Mrs. Terry said several times that she would kill both judges FIELD and SAWYER.

"J. C. FRANKS.

"Subscribed and sworn to before me, this seventeenth day of September, A. D. 1888. F. D. MONCKTON.

"Commissioner U. S. Circuit Court, Northern District of California."

AFFIDAVIT OF HENRY FINNEGASS.

"*State of California, City and County of San Francisco—ss.:* Henry Finnegass, being first duly sworn, deposes and says: That he is a citizen of the United States, over forty-five years of age; that he was agent of the secret service division of the United States treasury department for the Pacific Coast from March 1, 1871, to May 1, 1888, and during most of said time has also acted as a deputy United States marshal for the district of California; that he was present in the court-room of the United States circuit court in the appraisers' building, corner of Sansome and Washington streets, in the city and county of San Francisco, on September 3, 1888, when the judges were delivering their opinion in the cases of *Sharon v. Terry et al.*, and *Newlands et al. v. Terry et al.* The opinion of the court was being delivered by Judge FIELD, and when he had proceeded with the reading of the opinion for twenty minutes, commencing at eleven o'clock, he was interrupted by Mrs. Terry rising to her feet and saying, 'Judge, are you going to take the responsibility of ordering me to deliver up that marriage contract?' Judge FIELD immediately said, 'Take your seat, madam.' Mrs. Terry:

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retorted, 'How much did you get for that decision? You have been bought by Newlands.' The judge then said, 'Marshal, remove that woman from the court-room, and the court will deal with her hereafter.' During this time Mrs. Terry was standing almost immediately in front of Judge FIELD, at the table near the railing outside of the clerk's desk. When Judge FIELD ordered the marshal to remove Mrs. Terry from the court-room, she sat down, saying in a loud voice and indignant and insulting manner, 'I won't go out, and you can't put me out,' and other words to that effect. During this time Marshal Franks was standing at the west end of the railing around the clerk's desk, and about ten feet distant from where Mrs. Terry was standing and sitting. Judge Terry was sitting beside Mrs. Terry at her right hand, and between Mrs. Terry and the marshal. Immediately upon Judge FIELD directing the marshal to remove Mrs. Terry from the court-room, the marshal walked around behind Judge Terry towards Mrs. Terry. While the marshal was thus proceeding, Judge Terry rose to his feet, saying, as the marshal passed him, 'Don't touch my wife; get a written order.' The marshal, in effect, replied that he had order enough. Then Judge Terry said, 'No God damn man shall touch my wife;' and he tried to get between the marshal and his wife. The marshal went to take hold of Mrs. Terry's arm, when Judge Terry drew back and struck him with his right fist a severe blow on the face. The marshal then pushed Judge Terry with his hands. Then Judge Terry unbuttoned his coat, and thrust his right hand into his bosom through the open place of his vest. When I saw him make this motion I sprang towards him, and caught him by the right arm, and pulled his hand away from his vest, and pulled him back on a chair. Two other men took hold of him at the same time and we held him down. He was swearing all the time, saying, 'God damn you, let me up; you sons of bitches, let me up;' and other exclamations of that character. However, we held him there until his wife was taken forcibly out of the room by Marshal Franks and his assistant. Then we let Terry up, and I went up with him to near the swinging doors connecting the court-room with the passage-way leading into the corridor. About five feet from

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the swinging doors, and in the court-room, I released my hold of Judge Terry's right arm, and let go of him, and he went through the door, and I held one side of the door open with my left hand, and this door was not closed until Judge Terry had drawn his bowie-knife, and was brandishing it in the passage-way leading to the corridor. When he got a few feet from the swinging doors into the passage-way, I heard some one say, 'Look out, he's got a knife.' I let go the swinging door and ran out, and caught him in the said passage-way by the right arm, in which he held his knife, and at the same instant a deputy marshal by the name of Farish caught hold of Judge Terry. He violently resisted us, and we struggled from the passage-way into the corridor, and across the corridor into the door leading into the marshal's office. During this time Judge Terry shouted loudly, using such exclamations as 'Let go, let go, you sons of bitches; I will cut you into pieces; I will go to my wife.' We struggled into the space before the counter in the marshal's office, where we took Judge Terry's knife from him. I loosed some of his fingers, and Deputy Marshal Farish loosed some, and a man standing by pulled the knife from Judge Terry's hand. The knife, including the handle, is $9\frac{1}{4}$ inches long, the blade being 5 inches long, having a sharp point and is what is commonly called a 'bowie-knife.' Immediately after this was done Marshal Franks came out from his inner office, where he had placed Mrs. Terry, and said, 'Has he got a knife?' Deputy Farish replied, 'He did have one, but it has been taken away from him.' Then the marshal allowed Judge Terry to go in and join his wife in the marshal's inner office, and he was there detained. I went back into the court-room, and remained during the reading of the opinion. The reading was finished about half past twelve o'clock. Terry's conduct throughout this affair was most violent. He acted like a demon; and all the time while in the corridor, and before the counter of the marshal's office, he used loud and violent language, which could be plainly heard in the court-room, and, in fact, throughout the building. Mrs. Terry resisted with all her power the efforts of the marshal in taking her from the court-room, and he was compelled to remove her forcibly. While being removed she screamed and

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shouted her abuse of the judges, saying they had been bought, and so forth; and also abused Marshal Franks, calling him a hireling, paid to do his dirty work, and words to that effect.

“HENRY FINNEGASS.

“Subscribed and sworn to before me, this thirteenth day of September, A. D. 1888. F. D. MONCKTON,

“Commissioner United States Circuit Court, Northern District of California.”

Deputy Marshal Farish, in his affidavit, says:—

“After Mr. Franks had gone out with Mrs. Terry, we released our hold of him, and he rushed out of the court-room. I followed close after him, and in passing through the passage-way leading from the court-room into the corridor of the court building, I noticed he had a bowie-knife in his hand. I grappled with him, and caught his hand, Detective Finnegass seizing him at the same time. He struggled, and tried to get his hands free, swearing and threatening all the time. We struggled together till we got to the outer door leading into the marshal's rooms, when Judge Terry, getting his knife into his left hand, which was disengaged (I and others having hold of his right), raised it above our heads, and with some expression I could not exactly understand said, in effect, ‘I will cut you in pieces.’ I jumped back, and as he turned to go in the office, I cried out to shut the door, at the same time catching his arm, and with the assistance of Mr. Finnegass and another party, a stranger to me, we took the knife from him just as he was attempting to go in the inner door.”

And again:—

“Although I noticed Judge Terry closely during this affair, I did not observe any act or word on his part to restrain Mrs. Terry, after the order was made to remove Mrs. Terry, in what she was doing, or to have her go from the court-room; on the contrary, Judge Terry resisted the marshal, as I have stated. The marshal, so far as I could see, treated Mrs. Terry in every manner and respect politely and courteously.”

Deputy Marshal Harris, in his affidavit, says:—

“I was closely observing Judge Terry and his wife when she interrupted Judge FIELD; saw Mrs. Terry say something to

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Judge Terry, to which he nodded, as if assenting to what she had said. Immediately after this Mrs. Terry rose to her feet, and commenced talking, as I have above stated. Judge Terry did not attempt in any way to stop Mrs. Terry, or prevent her from doing what she did, as I have above stated."

Deputy Marshal Presbury, in his affidavit, says:—

"Judge Terry, having been released from the grasp of those who held him, proceeded toward the door, feeling apparently for something within his waistcoat. I stepped to his side, and saw that he was drawing from his bosom a large knife, which he fairly exposed just inside of the court-room door. On emerging from the door he held the knife above his head, saying, 'I am going to my wife.' I walked beside him until he reached the outside door of the marshal's office, where his further progress was prevented by Chief Deputy Farish and two or more of the marshal's deputies, together with detective Finnegass and others. After a struggle the knife was taken from him, and he was permitted to join his wife in the marshal's room. He remained there until an order was received from the court committing him and his wife to jail, whereupon they were taken from the building by the marshal and his deputies."

S. Heydenfeldt, Esq., presented the petition to the circuit justice.

John A. Stanly, Esq., submitted the following authorities from the supreme court of North Carolina, to the effect that a disavowal on oath of any intended disrespect to the court purges the contempt and entitles the offending party to be discharged: *In re Moore*, 63 N. C. 408; *Ex parte Biggs*, 64 N. C. 217, 218; *In re Walker*, 82 N. C. 98, 99.

On the 17th of September the petition was denied. On its denial the following opinion of the court was delivered by Mr. Justice FIELD, SAWYER, Circuit Judge, and SABIN, District Judge, concurring:—

By the Court, FIELD Circuit Justice. We have received a petition from David S. Terry praying that the order of this court committing him to prison for contempt may be revoked.

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To pass intelligibly upon the petition, a brief statement of the circumstances under which the order was made will be necessary. On the 3d of September, instant, the cases of Frederick W. Sharon, as executor, against David S. Terry and Sarah Althea Terry, his wife, and of Francis G. Newlands, as trustee, and others against the same parties, were before this court on demurrers to bills to revive and carry into execution the final decree in the suit of *William Sharon v. Sarah Althea Hill*, and were decided on that day. Shortly before the court opened the defendants came into the court-room and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the judges, the defendant, David S. Terry, being at the time armed with a bowie-knife concealed on his person, and the defendant, Sarah Althea, his wife, carrying in her hand a small satchel which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the justice of the supreme court of the United States assigned to this circuit, who was presiding; the United States circuit judge of this circuit, and the United States district judge of the district of Nevada, called to this district to assist in holding the circuit court. Almost immediately after the opening of the court the presiding justice commenced reading its opinion in the cases mentioned, but had not read more than one fourth of it when the defendant, Sarah Althea Terry, arose from her seat and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. The presiding justice replied, "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out in a violent manner that the justice had been bought, and wanted to know the price he held himself at; that he had got Newlands' money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The judges and parties present differ as to the precise words used, but all concur as to their being of an exceedingly vituperative and insulting character.

The presiding justice then directed the marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect.

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The marshal thereupon proceeded towards her to carry out the order for her removal and compel her to leave, when the defendant, David S. Terry, rose from his seat, evidently under great excitement, exclaiming, among other things, that "No living man shall touch my wife," or words of that import, and dealt the marshal a violent blow in his face. He then unbuttoned his coat and thrust his hand under his vest where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal then removed Mrs. Terry from the court-room. Soon afterwards Mr. Terry was allowed to rise and was accompanied by officers to the door leading to the corridor, on which was the marshal's office. As he was about leaving the room, or immediately after stepping out of it (and it is immaterial which), he succeeded in drawing his knife, when his arms were seized by a deputy marshal and others present, to prevent him from using it, and they were able to wrench it from him only after a violent struggle. The affidavits of officers of the court and others present, filed herewith, detail the facts.

For their conduct and resistance to the execution of the order of the court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt and ordered to be imprisoned, the former for thirty days and the latter for six months.

The commitment of Terry recited the contemptuous conduct of Sarah Althea and the order of the court directing the marshal to remove her from the court-room, and that while the marshal was attempting to execute the order, the said David S. Terry assaulted him in the presence of the court and beat him; and also that said Terry wrongfully and unlawfully assaulted the marshal with a deadly weapon, with intent to obstruct the administration of justice.

There were two matters recited for which Terry was adjudged guilty of contempt: *First*, resisting the marshal in the execution of the order, and beating him; and *second*, unlawfully assaulting the marshal with a deadly weapon.

Section 725 of the Revised Statutes defines the powers of the

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courts of the United States in matters of contempt. It declares that "the said courts shall have power . . . to punish by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

As thus seen, contempts embrace three classes of acts: *First*, the misbehavior of any person in the presence of the courts, or so near thereto as to obstruct the administration of justice;*

Second, the misbehavior of any of the officers of the court in their official transactions; and

Third, the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts.

The misbehavior of the defendant, David S. Terry, in the presence of the court, in the court-room, and in the corridor which was near thereto, and in one of which (and it matters not which) he drew his bowie-knife and brandished it with threats against the deputy of the marshal and others aiding him, is sufficient of itself to justify the punishment imposed. But great as this offense was, the forcible resistance offered to the marshal in his attempt to execute the order of the court, and beating him, was a far greater and more serious affair. This resistance and beating of its officer was the highest possible indignity to the government. When the flag of the country is fired upon and insulted, it is not the injury to the bunting, the linen, or silk on which the stars and stripes are stamped, which startles and arouses the country; it is the indignity and insult to the emblem of the nation's majesty which stirs every heart and

* In the case of *Savin, Petitioner*, reported in 131 U. S. 267, 277, it was held that within the meaning of section 725, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court.

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makes every patriot eager to resent them. So the forcible resistance to an officer of the United States in the execution of the process, orders, and judgments of their courts is in like manner an indignity and insult to the power and authority of the government, which can neither be overlooked nor extenuated.

The defendant, David S. Terry, now prays the court to revoke the order committing him. In his petition, he sets forth that in the transactions in the circuit court on the 3d instant, upon which his commitment was made, he did not intend to say or do anything disrespectful to the court or to the judges thereof, or to any one of them. He alleges that when his wife first arose from her seat and before she had uttered a word, he used every effort in his power to cause her to resume her seat and to remain quiet, and that he did nothing to encourage her in what he terms "her acts of indiscretion."

That when the order for her removal from the court-room was made, he rose from his seat for the purpose of removing her himself, quietly and peaceably, and had no intention of disturbing or preventing the execution of the order of the court; that he never struck, nor offered to strike, the marshal until the marshal had assaulted him, and had, in his presence, violently, and as he believed, unnecessarily, assaulted his wife.

That he neither drew, nor attempted to draw, any deadly weapon of any kind in the court-room, and that he did not assault, or attempt to assault, the United States marshal with any deadly weapon in the court-room or elsewhere.

He represents that after he had left the court-room he heard loud talking in one of the rooms of the marshal, and among the voices proceeding therefrom he recognized that of his wife; that he then attempted to force his way into that room, and finding it barred by a crowd of men, so that the door could not be closed, he, for the first time, drew from inside his vest a small sheath knife, at the same time saying to the crowd standing in his way, that he did not want to hurt any one, but that all he wanted was to get into the room where his wife was; that the crowd then parted, and he entered the doorway where some one said, "Let him in, if he will give up his knife," and he then immediately gave up his knife.

The petitioner further alleges that in none of these transactions did he have the slightest idea of showing any disrespect to the court, or to any of its judges, and that the fact that he lost his temper was a natural consequence of his being himself assaulted, when he was making an honest effort to enforce the order of the court, and of seeing his wife assaulted in his presence.

Upon this statement he asks the revocation of the order committing him to prison.

We have read this petition with great surprise at its omissions and misstatements. As to what occurred under our immediate observation, its statement does not accord with the facts as we saw them; as to what occurred at the further end of the room, and in the corridor, its statement is directly opposed to the concurring accounts of the officers of the court and parties present, whose position was such as to preclude error in their observations. According to the sworn statement of the marshal, which accords with our own observation, so far from having struck or assaulted Terry, he had not even laid his hands upon him when the violent blow in the face was received. And it is clear beyond controversy that Terry never voluntarily surrendered his bowie-knife, and that it was wrenched from him only after a violent struggle.

We can only account for his misstatement of facts as they were seen by numerous witnesses, by supposing that he was in such a rage at the time that he lost command of himself, and does not well remember what he then did, or what he then said. Some judgment as to the weight this statement should receive, independently of the incontrovertible facts at variance with it, may be formed from his speaking of the deadly bowie-knife he drew as a small sheath knife, and of the shameless language and conduct of his wife as "her acts of indiscretion."

No one can believe that he thrust his hand under his vest where his bowie-knife was carried without intending to draw it. To believe that he placed his right hand there for any other purpose—such as to rest it after the fatigue of his violent blow in the marshal's face, or to smooth down his ruffled linen—would be childish credulity.

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But even his own statement admits the assaulting of the marshal who was endeavoring to enforce the order of the court, and his subsequently drawing a knife to force his way into the room where the marshal had removed his wife. Yet he offers no apology for his conduct, expresses no regret for what he did, and makes no reference to his violent and vituperative language against the judges and officers of the court while under arrest, which is detailed in the affidavits filed.

There is nothing in his petition which would justify any remission of the imprisonment. The law imputes an intent to accomplish the natural result of one's acts, and when those acts are of a criminal nature it will not accept, against such implication, the denial of the transgressor. No one would be safe if a denial of a wrongful or criminal intent would suffice to release the violator of law from the punishment due to his offenses.

Why did the petitioner come into court with a deadly weapon concealed on his person? He knew that as a citizen he was violating the law which forbids the carrying of concealed weapons, and as an officer of the court—and all attorneys are such officers—was committing an outrage upon professional propriety, and rendering himself liable to be disbarred. (*Sharon v. Hill*, 11 Sawy. 122.)

Therefore, considering the enormity of the offenses committed, and the position the petitioner once held in this state, which aggravates them to a degree not imputable to the generality of offenders, the court, with a proper regard to its own dignity, the majesty of the law, and the necessity of impressing upon all men that forcible resistance to the lawful orders of the courts of the United States will not go unpunished, however high the offending parties, cannot grant the prayer of the petitioner; and it is accordingly denied.

In October following Mr. Terry petitioned the supreme court of the United States for a writ of habeas corpus, alleging that he was unlawfully imprisoned, under the order of the circuit court, in the jail of Alameda County, in California. He sets forth the order of the circuit court under which he was held, and also the petition for a revocation of that order, which he

had presented to the circuit court on the 12th of September; and stated that his petition was denied, and he insisted that the circuit court had no jurisdiction of his person at the time it made the order mentioned; that it possessed no legal power to make it; that he was entitled to be released from his imprisonment upon the filing of the petition, and that the order of that court was illegal and unwarranted by the law of the land. His petition was supported by elaborate arguments filed by Messrs. Shellabarger and Wilson appearing for him. The supreme court denied his petition on the 12th of November, 1888, and the following is its opinion delivered at the time by Mr. Justice Harlan, omitting the order and petition to the circuit court which are set forth in the opinion:—

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There can be no dispute either as to the power or duty of this court in cases of this character. Its power to issue a writ of habeas corpus, for the purpose of inquiring into the cause of the restraint of the liberty of the person in whose behalf the writ is asked, is expressly conferred by statute, and extends to the cases, among others, of prisoners in jail under or by color of the authority of the United States, and of persons who are in custody in violation of the constitution or laws of the United States. (Rev. Stats. secs. 751, 752, 753.) Its general duty in such cases is also prescribed by statute. Upon complaint in writing, signed by, and verified by the oath of the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known, it is the duty of the court to "forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." (Rev. Stats. secs. 754, 755.) The writ need not, therefore, be awarded if it appear upon the showing made by the petitioner that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison. (*Ex parte Kearney*, 7 Wheat. 38, 45; *Ex parte Watkins*, 3 Peters, 193, 201; *Ex parte Milligan*, 4 Wall. 1, 11.)

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It is proper in this connection to say that since the passage of the act of March 3, 1885, ch. 353 (23 Stats. 437), amending section 764 of the Revised Statutes so as to give this court jurisdiction, upon appeal, to review the final decisions of the circuit courts of the United States in cases of habeas corpus, when the petitioner alleges that he is restrained of his liberty in violation of the constitution or laws of the United States, the right to the writ, upon original application to this court, is not, in every case, an absolute one. In *Wales v. Whitney*, 114 U. S. 564, it appears that a direct application to this court for the writ, after a decision adverse to the petitioner in the supreme court of the District of Columbia, was abandoned on the suggestion that he could bring that decision to this court for review under the act of 1885; and it was brought here under that statute. In *Ex parte Royall*, 117 U. S. 241, 250, upon appeal from a decision of a circuit court of the United States refusing to award the writ to one alleging that he was restrained of his liberty in violation of the constitution of the United States by an order of a state court, in which he stood indicted for an alleged offense against the laws of such state, it was held that while the circuit court had power to grant the writ and discharge the accused in advance of his trial under the indictment, it was not bound to exercise that power immediately upon application being made for the writ, but could await the result of the trial, and, in its discretion, as the special circumstances of the case might require, put the petitioner to his writ of error from the highest court of the state. In *Sawyer's Case*, 124 U. S. 200, this court entertained an original application for a writ of habeas corpus without requiring the petitioner to apply, in the first instance, to the proper circuit court; but, in that case, as in this, the application proceeded upon the ground that the circuit court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the constitution of the United States.

Nor can there be any dispute as to the power of a circuit court of the United States to punish contempts of its authority. In *United States v. Hudson*, 7 Cranch, 34, it was held that the courts of the United States, from the very nature of their institution, possess the power to fine for contempt, imprison for con-

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tumacy, enforce the observance of order, etc. In *Anderson v. Dunn*, 6 Wheat. 204, 227, it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates." So in *Ex parte Robinson*, 19 Wall. 505, 510: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." (*Ex parte Bollman*, 4 Cranch, 75, 94; Story, Const. sec. 1774; Bacon's Abr. Courts, E.) And such is the recognized doctrine in reference to the powers of the courts of the several states. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice," the supreme judicial court of Massachusetts well said, in *Cartwright's Case*, 114 Mass. 230, 238, "is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of *magna charta* and of the twelfth article of our declaration of rights." The declaration of rights here referred to was that which formed part of the constitution of Massachusetts, and contained the prohibition, inserted in most of the American constitutions, against depriving any person of life, liberty, or estate, except by the judgment of his peers, or the law of the land. So in *Cooper's Case*, 32 Vt. 253, 257: "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." Without such power, it was observed in *Easton v. State*, 39 Ala. 552, the administration of the law would be in continual danger of being thwarted by the lawless. To the same effect are *Watson v. Williams*, 36 Miss. 344; *Johnston v. Commonwealth*, 1 Bibb, 598; *Clark v. People*, Breese Rep. 266; *Commonwealth v. Dandridge*, 2 Va. Cas. 408;

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Ex parte Hamilton and Smith, 51 Ala. 68; *Redman v. State*, 28 Ind. 212; *People v. Turner*, 1 Cal. 153; *State v. Morrill*, 16 Ark. 388; and numerous cases cited in note to *Clark v. People*, Breese Rep. 266, in 12 Am. Dec. 178. See, also, *Queen v. Lefroy*, 9 Q. B. 134. But this power, so far as the circuit courts of the United States are concerned, is not simply incidental to their general power to exercise judicial functions; it is expressly recognized, and the cases in which it may be exercised are defined by acts of Congress. They have power, by statute, "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." (Rev. Stats. sec. 725; 1 Stats. 83; 4 Stats. 487.)

With these observations as to the power and duty of the courts of the United States, when applied to for writs of habeas corpus, we proceed to the consideration of the general question as to whether the petition in this case shows that the prisoner is or is not entitled to the writ. The contention of his counsel is, that the circuit court failed to take such steps as were necessary to give jurisdiction of the person of the prisoner at the time the order was made committing him to jail for contempt; and, therefore, that the order was illegal, and the writ should be awarded. If this position is sound, the conclusion stated would necessarily follow; for while the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the sphere of the authority of the court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the subject-matter. (*Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Curtis*, 106 U. S. 371; *In re Ayer*, 123 U. S. 443, 485; *In re*

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Sawyer, 124 U. S. 200, 221; *Harvey v. Tyler*, 2 Wall. 328, 345; *Ex parte Fisk*, 113 U. S. 713, 718.) In this last case it was said that when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner." A judgment which lies without the jurisdiction of a court, even one of superior jurisdiction and general authority, is, upon reason and authority, a nullity.

This question, it must be here observed, does not involve an inquiry into the truth of the specific facts recited in the order of commitment, as constituting the contempt. As the writ of habeas corpus does not perform the office of a writ of error or an appeal, these facts cannot be re-examined or reviewed in this collateral proceeding. They present a case which, so far as the subject-matter is concerned, was manifestly within the jurisdiction of the circuit court. Notwithstanding the statements made in the petition addressed to the circuit court on the 12th of September, as to what the petitioner did, and as to what he did not do, on the occasion referred to in the order of commitment, it must be taken as true, upon the present application, and would be taken as true, upon a return to the writ, if one were awarded, that, on the 3d of September, 1888, Mrs. Terry was guilty of misbehavior in the presence of the judges of the circuit court, while they were engaged in the hearing and determination of causes pending before it; that the court thereupon ordered the marshal to remove her from the court-room; that the petitioner, an attorney, and therefore an officer of the court, resisted the enforcement of the order by beating the marshal, and by assaulting him with a deadly weapon, with intent to obstruct the administration of justice and the execution of said order. It must also be taken as true, upon the present application, that what the petitioner characterizes as self-defense against an assault of the marshal, but which the circuit court in its order of commit-

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ment expressly finds, upon its personal view of the facts, was violence and misconduct upon his part, occurred in its immediate presence; for, if it were competent in this proceeding for the petitioner to contradict that fact, this has not been done. While in his petition to this court he disputes the jurisdiction of the circuit court of his person at the time he was imprisoned, his petition addressed to that court on the 12th of September, and made part of the present application, makes no question as to the alleged contempt having been committed in the presence of the circuit court, and only puts in issue the principal facts recited in the order of commitment as constituting the contempt for which he was punished. Those facts necessarily entered into the inquiry by the circuit court as to whether the prisoner was or was not guilty of contempt, and this court cannot, in this proceeding, in virtue of any power conferred upon it by existing legislation, go behind the determination of them by that court. It can deal only with such defects in the proceedings below as render them, not simply erroneous or irregular, but absolutely void. (*Ex parte Robinson*, 19 Wall. 505, 511; *Ex parte Kearney*, 7 Wheat. 38, 43.)

What, then, are the grounds upon which the petitioner claims that the circuit court was without jurisdiction to make the order committing him to jail? They are: (1) That the order was made in his absence; (2) that it was made without his having had any previous notice of the intention of the court to take any steps whatever in relation to the matters referred to in the order; (3) that it was made without giving him any opportunity of being first heard in defense of the charges therein made against him.

The second and third of these grounds may be dismissed as immaterial in any inquiry this court is at liberty, upon this original application, to make. For, upon the facts recited in the order of September 3d, showing a clear case of contempt committed in the face of the circuit court, which tended to destroy its authority, and by violent methods, to embarrass and obstruct its business, the petitioner was not entitled, of absolute right, either to demand a regular trial of the question of contempt, or to have notice by rule of the court's intention to pro-

ceed against him, or to have opportunity to make formal answer to the charges contained in the order of commitment. It is undoubtedly a general rule in all actions, whether prosecuted by private parties, or by the government, that is, in civil and criminal cases, that "a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." (*Windsor v. McVeigh*, 93 U. S. 274, 277.) But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts, which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule." (4 Blackst. Com. 286.) In Bacon's Abridgment, title Courts, E, it is laid down that "every court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of

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any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and immediately order them into custody." It is utterly impossible, said Abbott, C. J., in *Rez v. Davidson*, 4 Barn. & Ald. 329, 333, "that the law of the land can be properly administered if those who are charged with the duty of administering it have not the power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

To the same effect are the adjudications by the courts of this country. In *State v. Woodfin*, 5 Ired. 199, where a person was fined for a contempt committed in the presence of the court, Chief Justice Ruffin said: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace *in facie curiæ* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial." So in *Whitten v. State*, 36 Ind. 311: "When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment, there will be no charge, no plea, no issue, and no trial; and the record that shows the punishment will also show the offense, and the fact that the court had found the party guilty of the contempt. On appeal to this court any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court." Again, in *Ex parte Wright*, 65 Ind. 508, the court, after observing that a direct contempt is an open insult in the face of the court to the persons of the judges while presiding, or a resistance to its powers

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in their presence, said: "For a direct contempt the-offender may be punished instantly by arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing, etc." (4 Steph. Com. Bk. 6, ch. 15; Tidd's Prac. 479, 480; *Ex parte Hamilton and Smith*, 51 Ala. 68; *People v. Turner*, 1 Cal. 155.)

It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, 7 Wheat. 39, 45, may be here repeated: "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice."

It results from what has been said that it was competent for the circuit court, immediately upon the commission, in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume, from the record before us, that it was satisfied, from what occurred under its own eye, and within its hearing, that the ends of justice demanded immediate action, and that no explanation could mitigate his offense, or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment. Whether the facts justified such punishment was for that court to determine under its solemn responsibility to do justice, and to maintain its own dignity and authority. (*In re Chiles*, 22 Wall. 157, 168.) Its conclusion upon such facts, we repeat,

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is not, under the statutes regulating the jurisdiction of this court, open to inquiry or review in this collateral proceeding. If we were to indulge in any presumption as to what actually occurred when the marshal proceeded in the execution of the order to remove Mrs. Terry from the court-room, we must presume that the circuit court fully considered the statements contained in the petition of September 12th, and knowing them to be inaccurate or untrue, refused to set aside or modify its previous order of commitment. Its action in that regard cannot be revised or annulled by this court upon an original application for habeas corpus.

But it is contended that the order of September 3 was void, because, as alleged in the present application for the writ of habeas corpus, it was made in the "absence" of the petitioner. In considering this suggestion, it must not be forgotten that the order of imprisonment shows, and the fact is not asserted to be otherwise, that it was made and entered on the same day on which, and, presumably, at the same session of the court at which the contempt was committed; and there is no claim that any more time intervened between the commission of the contempt and the making of the order than was reasonably required to prepare and enter in due form such an order as the court, upon consideration, deemed proper or necessary. Indeed, the petition of September 12th, made part of the present application, shows that the petitioner, after his personal conflict with the marshal in the presence of the judges, voluntarily left the court-room, and with drawn knife forced his way into another room in the same building, occupied by the marshal, and to which, we presume, the latter, in executing the order above referred to, had removed Mrs. Terry. There is no pretense that the petitioner left the building in which the court was held before the order of commitment was passed.

The precise question, therefore, to be now determined, is, whether the retirement of the petitioner from the court-room into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed, at the moment the contempt was com-

mitted, to order his immediate imprisonment, without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form? In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment. The departure of the petitioner from the court-room to another room, near by, in the same building, was his voluntary act. And his departure, without making some apology for, or explanation of, his conduct, might justly be held to aggravate his offense, and to make it plain that, consistently with the public interests, there should be no delay, upon the part of the court, in exerting its power to punish.

If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and as the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defense, would not affect its power to inflict instant punishment. Jurisdiction to inflict such punishment having attached while he was in the presence of the court, it would not have been defeated or lost by his flight and voluntary absence. Upon this point the decision in *Middlebrook v. State*, 43 Conn. 268, is instructive. That was a case of contempt committed by a gross assault upon another in open court. The offender immediately left the courthouse and the state. The court made reasonable efforts to procure his personal attendance, and, those failing, a judgment was entered in his absence, sentencing him to pay a fine and to be imprisoned for contempt of court. One of the questions presented for determination was whether there was jurisdiction of the person of the absent offender. The court said: "The offense was intentionally committed in the presence of the court.

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When the first blow was struck, that instant the contempt was complete, and jurisdiction attached. It did not depend upon the arrest of the offender, nor upon his being in actual custody, nor even upon his remaining in the presence of the court. When the offense was committed he was in the presence, and, constructively, at least, in the power of the court. He may by flight escape merited punishment; but that cannot otherwise affect the right or the power of the court. Before the court could exert its power, the offender, taking advantage of the confusion, absented himself and went beyond the reach of the court; but, nevertheless, the jurisdiction remained, and it was competent for the court to take such action as might be deemed advisable, leaving the action to be enforced and the sentence carried into execution whenever there might be an opportunity to do so. If it was necessary that the judgment should be preceded by a trial, and the facts found upon a judicial hearing, as with ordinary criminal cases, it would be otherwise. But in this proceeding nothing of the kind was required. The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." It is true that the present case differs from the one just cited, in that the offender did not attempt by flight to escape punishment for his offense. But that circumstance could not affect the power of the circuit court, without trial or further proof, to inflict instant punishment upon the petitioner for the contempt committed in its presence. It was within the discretion of that court, whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defense. Any abuse of that discretion would be at most an irregularity or error, not affecting the jurisdiction of the circuit court.

We have not overlooked the earnest contention of petitioner's counsel that the circuit court, in disregard of the fundamental principles of *magna charta*, in the absence of the accused, and

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without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded "to accuse, to try, and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offense committed at a time preceding, and separated from, the commencement of his prosecution." We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature, and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is cited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence.

Nor, in our judgment, is it an accurate characterization of the present case to say that the petitioner's offense was committed "at a time preceding, and separated from, the commencement of his prosecution." His misbehavior in the presence of the court, his voluntary departure from the court-room without apology for the indignity he put upon the court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the court was held, and the making of the order of the commitment, took place, substantially, on the same occasion, and constituted, in legal effect,

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one continuous complete transaction, occurring on the same day, and at the same session of the court. The jurisdiction, therefore, of the circuit court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the court-room in the immediate presence of the judges.

Whether the circuit court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and imprisonment for the contempt, without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned, is a question not necessary to be considered on the present hearing.

The application for the writ of habeas corpus is denied.

Mr. Justice FIELD took no part in the decision of this case.

AMES v. HAGER.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 17, 1888.

1. NATIONAL COURTS—CASES ARISING UNDER REVENUE LAWS—JURISDICTIONAL AMOUNT.—Clause 4, section 629, Revised Statutes, was not repealed by the act of March 3, 1875 (18 Stats. 470), or by the act of March 3, 1887 (24 Stats. 552), defining the jurisdiction of the circuit courts, and these courts have jurisdiction in suits arising under revenue laws, although the amount in dispute is less than two thousand dollars.

Before SAWYER, Circuit Judge.

Mr. A. P. Van Duzer, for plaintiff.

Mr. J. T. Carey, United States Attorney, for defendant.

SAWYER, Circuit Judge. This is a suit to recover from the collector of the port of San Francisco the sum of \$375.75, draw-back on grain bags claimed to be illegally withheld. Defendant demurs on the ground that the sum sought to be recovered being less than \$2,000, the court has no jurisdiction under the act of March 3, 1887. In *United States v. Huffmaster*, ante, 280;

35 Fed. Rep. 81 (No. 3,704), we held that under the act of March 3, 1875, the court had no jurisdiction over a suit to recover \$250, the value of a quantity of wood illegally cut on the public lands. And in a similar suit, brought under the act of March 3, 1887, that there is no jurisdiction where the amount claimed is less than \$2,000. (*United States v. Huffmaster*, ante, 283; 35 Fed. Rep. 81, 83.) We held that the first, second, and third clauses of section 629, Revised Statutes, were repealed by the subsequent acts of 1875 and 1887. The question now is, whether the fourth paragraph is also repealed—this being a suit arising under the revenue laws, in regard to which there is no limitation in that clause. Although this clause speaks of “suits at law or in equity, arising under any act providing for revenue from imports or tonnage,” the supreme court has held that a suit of this character is not a common-law suit on a promise, but a suit under a statute. (*Arnson v. Murphy*, 109 U. S. 238.) It seems manifest that the acts of 1875 and 1887 cover the whole subject-matter of the first three clauses of section 629, Revised Statutes, but the intention as to the remainder of the section is not so clear. The subject-matter of the first three clauses is substantially the same as that of section 11 of the act of 1789, and embraces the general jurisdiction of the court. That of the fourth claim is covered by, and taken from, the act of 1833 (4 Stats. 632), and the subsequent clauses from various other statutes conferring special jurisdiction. Before the consolidation in the Revised Statutes all these provisions stood and were in force together, and, as to many of them, at least, there was no limitation as to the amount necessary to confer jurisdiction. In the Revised Statutes, they were collected into one section, a clause having been given to each class. The language of the statute was changed in order to collate and condense, without intending to change the law. In the acts of 1875 and 1887, Congress returns substantially to the language of the act of 1789, conferring general jurisdiction, and doing so, is it not reasonable to suppose that by this return to the language of that act it was intended to embrace the subject-matter only of that act, with respect to limiting the jurisdiction by the amount in dispute? If not so intended, then no suit could be brought under the act of 1875, under either of the

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clauses subsequent to the third, including suits upon patents for inventions, unless the amount in dispute exceeds \$500, and none can now be brought under the act of 1887, unless the amount involved exceeds \$2,000. Although in some doubt on the point, I shall hold that only the first three clauses are covered, and, therefore, repealed by the acts of 1875 and 1887, and that under the fourth clause it is not necessary that the amount in dispute should exceed \$2,000 in order to give the court jurisdiction. Let the demurrer be overruled.

WEDEKIND v. SOUTHERN PACIFIC COMPANY.

CIRCUIT COURT, DISTRICT OF NEVADA.

OCTOBER 1, 1888.

1. REMOVAL OF CAUSE—TIME OF APPLICATION.—In an action begun in a state court defendant was by state statute required to answer the complaint on or before May 1, 1888. On May 1st defendant appeared specially in the case, and moved to set aside the service of summons, but neither sought nor obtained any rule or order of court extending its time to plead to the complaint. The motion to quash the service of summons was heard, and taken under advisement by the court, May 28th. While the same was so under advisement, on May 31st, defendant filed its general answer to the complaint, and at the same time filed its petition and bond on removal to this court. On motion to remand, *held*, that the case must be remanded, the petition and bond not having been filed in the state court at the time defendant was by law required to answer or plead to the complaint, no extension of time having been granted by any rule or order of said state court.

Before SABIN, District Judge.

On motion to remand.

Mr. John F. Alexander and *Mr. R. H. Lindsay*, for motion.*Mr. J. B. Marshall* and *Messrs. Baker & Wines*, contra.

SABIN, J. The plaintiff in this action is a citizen and resident of the state of Nevada. The defendant is a corporation organized under the laws of the state of Kentucky, and is the lessee of the Central Pacific Railroad, a line of road extending from San Francisco, California, to Ogden, Utah. The action is brought by plaintiff to recover from defendant the sum of

seventy-seven thousand dollars damages alleged to have been sustained by plaintiff on account of injuries by him received December 22, 1887, by reason of defendant's negligence and carelessness in transporting plaintiff as a passenger over said railroad, in Washoe County, state of Nevada. The action was begun in the proper state court, in Washoe County, April 21, 1888, by the filing of a complaint, and the issuance of summons thereon on said day. On the same day, the sheriff of said county personally served said summons, together with a certified copy of the complaint, on H. W. Higgins, "agent of defendant," at said county, as appears by the sheriff's return upon said summons. Higgins was defendant's freight agent at Reno, in said county. The summons, and statute of Nevada applicable thereto, required the defendant to answer said complaint within ten days after the date of service thereof, exclusive of the day of service. This would have required the defendant to appear and plead to said complaint on or before May 1, 1888. On said May 1st defendant appeared specially in said court, by motion to set aside the service of the summons as insufficient. This motion was supported by affidavits. On May 28th this motion was heard by the court, both parties being present by their attorneys, and was taken under advisement by the court. It is conceded that this motion was never decided by the court. On May 31st, and while said motion was still pending, defendant filed in said court its general answer to the complaint, and at the same time filed a petition and bond for the removal of the cause to the court. The ground of removal relied upon is that of the citizenship of the parties, plaintiff being a citizen of Nevada, defendant of Kentucky. Defendant failing to produce a perfect record of the case in this court, the plaintiff caused the same to be filed here, and now moves the court to remand the case to the state court for trial, under the provisions of section 3 of the act of Congress of March 3, 1887, relative to removal of causes. The portion of said section applicable to this motion reads:—

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to

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remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such state court at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond," etc.

In this case, as we have seen, the state statute required the defendant to plead to the complaint on or before May 1, 1888. It is true that on that day the defendant specially appeared in the state court, and moved to set aside the service of the summons. But this, in itself, in nowise extended defendant's time to answer or plead to the complaint, without an order or rule of court extending such time. The record does not show that any such rule or order was asked or obtained, nor is it suggested that there is any error in the record in this respect. We have carefully examined the rules prescribed and adopted by the district judges of this state for the conduct of business in their courts, and nowhere in the thirty-five rules by them adopted can we find any suggestion that a motion of this kind has the force or effect of extending indefinitely, or at all, the moving party's time to plead. Doubtless, in any proper case, the court would, upon motion, grant an extension of time to plead, pending the consideration of an important preliminary motion. But in this case no such request was made, or extension obtained, and we know of no reason why plaintiff might not have entered defendant's default on May 2d for want of a plea, answer, or demurrer. Were we to consider defendant's motion as a special plea, or in the nature of a special plea to the jurisdiction of the court, then defendant's position is no better, as the petition and bond for removal should have been filed contemporaneously with such plea.

We do not, however, consider this motion as a plea. It was simply a motion. It might have been made and heard in the state court, or in this court, just as defendant may have preferred. It was preferred that it be heard in the state court, and the petition for removal was not filed until thirty days after the date of

motion, and no extension of time to plead was sought or obtained, and that time expired May 1st, unless extended by order of court, or by stipulation of parties. The object of this provision of section 3 is obvious. It was intended to compel parties to decide *in limine*, in what court they wish the trial of the case to be had, and to make them abide by such decision. It would seem unnecessary to review at any length the rulings of the courts, supreme or circuit, upon the removal of causes either under the act of 1875 or that of 1887. They are uniform in holding parties to a strict compliance with the terms of the statutes. The jurisdiction of the circuit court is special, and it must clearly appear in all cases affirmatively, not presumptively. The record in this case falls far short of this. It is not clear how the answer came to be filed May 31st, while the court was still considering the motion to quash the service of the summons; nor is it explained in the arguments submitted. The record should show affirmatively that it was filed within the statutory time.

We have been strongly urged by defendant's counsel to consider, upon its merits, this motion made in the state court to quash the service of the summons in this action, and a large part of their brief is devoted to that subject—the sufficiency of the service upon the agent, Higgins. We cannot consider this matter at all upon this motion to remand. The motion to quash the service of summons was never before us. It was argued and submitted in the state court. And its decision now is wholly immaterial, for defendant has voluntarily appeared in the case without reserve, and filed its general answer to all of the issues tendered by the complaint. This waives any irregularity of service of summons, if any there was, and the motion to quash the service has now no significance.

The motion to remand the case to the state court must be granted, and it is so ordered, with costs.

THE DIRECTOR.

BALFOUR ET AL. v. THE DIRECTOR.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 9, 1888.

1. SHIPPING—CHARTER-PARTY—BREACH OF WARRANTY—ACTIONS—JOINDER OF CAUSES.—In case of a breach of warranty of seaworthiness of a charter-party, an action for the recovery of the goods shipped and for damages for the breach of warranty may be joined.
2. SAME—BREACH OF WARRANTY—RECOVERY OF POSSESSION OF CARGO.—The libellants chartered a ship to carry a cargo of wheat from Portland to Europe, and, when she was loaded, she commenced, from inherent weakness, to leak, so that her cargo had to be discharged. *Held*, that the vessel not being seaworthy at the date of the charter and the delivery of the cargo, there was a failure on the part of the ship-owner to perform the condition precedent to the contract, and the shipper was absolved therefrom, and was entitled to recover possession of his wheat, and such damages as he may have sustained by reason of such failure.

Before SAWYER, Circuit Judge.

In Admiralty. On appeal from district court. (*Ante*, 172; 34 Fed. Rep. 57.)

This case was heard on an appeal from the district court. The suit was brought to recover damages for the breach of a warranty of seaworthiness of the bark *Director*, and to recover the possession of 18,868 bags of wheat theretofore delivered to the same for transportation to Liverpool under said warranty. An exception to the libel for misjoinder of causes of action was overruled by the district court (11 Sawy. 493; 26 Fed. Rep. 708), and on the final hearing the court found that the bark was unseaworthy, and that the libellants might maintain the suit to recover possession of the wheat, and to recover damages for the non-performance of the contract of affreightment, which were a lien on the vessel.

Mr. C. E. S. Wood, for libellants.

Mr. Frederick R. Strong, for claimants.

SAWYER, Circuit Judge. Three points are made by counsel for the claimants and appellants against the findings and decree of the lower court: (1) That the possession of the wheat and

damages for the breach of warranty of seaworthiness cannot be recovered in one suit; (2) that the libellants, having sold the cargo of wheat to arrive in Liverpool, cannot maintain a suit to recover possession of the same, notwithstanding the repudiation of the sale and the return to the libellants of the bill of lading by the purchaser; and (3) the vessel was seaworthy at the date of the charter-party, or was made so before the expiration of the lay days.

The first two of these points involve questions of law. Upon both reason and authority, I think the libellants are entitled to join the cause of suit for possession of the wheat with that for damages in the one libel. They are also entitled, as against the claimants, to maintain the suit for the possession of the wheat. The sale in Liverpool has been repudiated by the purchaser, and the bills of lading returned to the libellants. The fact that the libellants may also intend to hold the purchaser liable in damages for such repudiation, if the law will permit, does not affect their right to the possession of the wheat, as against the claimants.

On the question of seaworthiness, I have read the testimony carefully, and am satisfied that at the date of the charter party the Director, contrary to the implied, as well as the express, warranty therein, was altogether unseaworthy; and the subsequent repairs did not make her seaworthy for such a voyage and cargo. The mere fact that she only brought three thousand dollars at the marshal's sale, after near five thousand dollars of repairs had been made upon her, is itself satisfactory evidence of her inherent weakness, and that nothing short of rebuilding her would make her seaworthy.

In conclusion, I adopt the findings of the district judge, both of fact and law, and for the reasons given in his opinion, to which I can add nothing.

There must be a decree for the libellants accordingly.

THE NITH.

THOMPSON ET AL. v. THE NITH.

CIRCUIT COURT, DISTRICT OF OREGON.

. OCTOBER 9, 1888.

1. SHIPPING—STOWAGE—SALT OVER IRON NEAR MAST.—It is bad stowage to place salt over iron and anvils, though crates of crockery be placed between them, and to place the salt, iron, and crates within an inch or so of the mast.
2. SAME—LIABILITY OF CARRIER—PERILS OF THE SEA.—Where the cargo is thus stored, even though a rent in the mast-coat, by which water went into the hold, causing the iron and anvils to rust, was a peril of the sea, the carrier is liable for the injury.

Before SAWYER, Circuit Judge.

In admiralty. On appeal from district court, *ante*, 368; 36 Fed. Rep. 86.

This case was heard on an appeal from the district court. The suit was brought to recover damages for the non-performance of a contract of affreightment concerning a lot of Swedish iron and anvils brought on the bark Nith from Liverpool to Portland. When the goods were discharged at this port they were found to be badly rusted from contact with salt water, and the libellants refused to receive them, and brought this suit for damages. The district court found for the libellants, and gave them a decree for \$3,996.18, the value of the goods at this port, with legal interest thereon from the date of arrival, with costs and disbursements. From this decree the claimant appealed.

Mr. Edward N. Deady, for libellants.

Mr. C. E. S. Wood, for claimant.

SAWYER, Circuit Judge. Three points are made here by counsel for the claimant and appellant against the findings and decree of the district court: (1) The iron was damaged with rust from contact with sea water when it was received on board the Nith; (2) the iron and anvils were properly stowed under the salt, with the crates of earthenware between them; and (3) the break in the mast-coat by which the sea water went into the hold,

Points decided.

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and caused the iron and anvils to rust, was a peril of the sea, for which the vessel is not liable.

On a careful examination of the evidence in the case, I am satisfied that the iron and anvils were in good condition when shipped on the Nith; that it was not good stowage to place salt over the iron and anvils, as was done in this case, even with the crates of crockery between them, and that it was clearly bad stowage to place the salt, crates, and iron within an inch or so of the mast. Admitting that the rent in the mast-coat was a peril of the sea, had it not been for this bad stowage, no harm would have resulted to the cargo, as the water would have run down the side of the mast to the bottom of the vessel. A peril of the sea does not excuse the carrier from a loss or injury to the goods committed to his care, if his own negligence or want of skill has contributed to the result. The cargo, and particularly the salt, should have been dunnaged away from the mast, so the water flowing down the same would not have affected it.

In conclusion, I adopt the findings of the district judge, both of fact and law, for the reasons given in his opinion, to which I can add nothing.

There must be a decree for the libellants accordingly.

IN RE YUNG SING HEE ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 10, 1888.

1. **CITIZENS OF CHINESE DESCENT.**—A person born in the United States of Chinese parents is, by the rule of the common law and by force of the fourteenth amendment, a citizen of the United States, and when restrained of his or her liberty of locomotion therein, may be delivered therefrom, on habeas corpus, by the proper national court. (*Ex parte Ohn King*, ante, 334; 35 Fed. Rep. 354, affirmed.)
2. **EXCLUSION ACTS CONFINED TO SUBJECTS OF FOREIGN POWER.**—Neither of the exclusion acts of 1862, 1884, nor 1888, purport to exclude from the United States the descendants of Chinese, born within the jurisdiction thereof.
3. **BANISHMENT BY LEGISLATIVE ACT.**—A legislative act which undertakes to inflict the punishment of banishment or exile from the United States, on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the constitution and therefore void.

Before DEADY, District Judge.

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Opinion of the Court—Deady, J.

Mr. Paul R. Deady, for the petitioner.

Mr. Lewis L. McArthur, for the United States.

DEADY, J. The writ was allowed in this case on October 8, 1888, and the hearing took place on the 10th of the same month.

The petition of Yung Sing Hee states that she was born in San Francisco, on January 15, 1866, and is a citizen of the United States; that she is restrained of her liberty by John R. Hill, the master of the steamship Danube, on which she took passage from Vancouver, British Columbia, for Portland, Oregon, on October 6, 1888; that the collector of customs of this port refuses to allow her to be landed from said vessel on the ground that she is a Chinese woman without a return certificate, and that under the recent exclusion act, her landing is prohibited under any circumstances.

The return of the master to the writ admits the facts stated in the petition, as to the custody of the petitioner.

On the hearing the United States district attorney intervened on behalf of the United States, and contested the allegation that the petitioner is a citizen of the same and entitled to land therein. On the hearing it was satisfactorily shown that Yong Soy Yat is a Chinese merchant of this city, where he has resided seven or eight years as a member of the firm of Tay Chung Lung; that for the nineteen years prior to coming here he lived in San Francisco, where he kept a store, and about 1863 was married to Ka Ho, a Chinese woman, at 729 Sacramento Street, by whom he had two children, a boy and a girl, the former being born in 1864 and the latter in 1865; that about eight years ago the mother and the two children went to China on the steamer Oceanic, where the former died not long since, and the boy remains with his parental grandfather, at school.

The petitioner is this girl. She came from China on the Canadian Pacific steamship to Victoria a short time since, and from there here on the Danube, as stated in the petition.

The testimony on which these facts are found, although given by Chinese persons, is consistent, reasonable, and convincing. It is probably much more entitled to credit than that on which

hundreds of Europeans are every day admitted to become citizens of the United States.

The father was directly corroborated in the main by the testimony of two Chinese merchants of this city who lived near him, and knew him and his family in San Francisco, from about the time of his marriage until the departure of the latter for China. And a rigid cross-examination failed to impair in the least the probability of their statements, or to cast a shadow of suspicion on their honesty.

On this state of facts, both by the common law and the fourteenth amendment, the petitioner is an American citizen, and is entitled to come and go within the United States as any other such citizen. She was born within or subject to the jurisdiction of the United States, and is therefore a citizen thereof. (See *Ex parte Chin King*, 35 Fed. Rep. 354, lately decided in this court.)

This being so, she is not within the purview of any of the restriction acts, which do not apply to American citizens of Chinese descent, any more than to those of European descent.

The act of 1882 (22 Stats. 58) relates exclusively to "Chinese laborers," whether "skilled or unskilled"; and so does the act of 1884. (23 Stats. 115.) Section 15 of the latter act declares that it "shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power." This clause was doubtless inserted to bring the Chinese residents of the British colony, Hong Kong, within the purview of the act; but it also, by a necessary implication, limits its operation to Chinese who are subjects of China or some foreign power, not including such as are citizens of the United States.

The recent act of October 1, 1888, purports to be a supplement to that of 1882, and is confined in terms to "Chinese laborers." As to them, it changes the law so as to prevent, if literally construed, the return of a Chinese laborer to the United States under any circumstances—not even when he left the country on the faith of a treaty with this government, and its certificate, giving him the right to return, and is within the sight of the American shore on his way back when the act takes effect.

So harsh and unjust a measure as this concerning the intercourse between friendly nations maintaining diplomatic relations

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Opinion of the Court—Deady, J.

is something unprecedented in this age of the world, and can only be accounted for by the fact that a presidential election is pending, in which each political party is trying to outbid the other for the "sand-lot" vote of the Pacific Coast, and particularly for that of San Francisco.

Neither is the petitioner a laborer. Indeed, I suppose no Chinese woman is a "laborer" within the meaning of the statute. This one, at least, does not belong to that class. She is the daughter of a merchant, and the testimony is, that she does not work at anything but sewing, and not at that for a living, but only for her own purposes. But still, were she not a citizen of the United States, and although she is not a "laborer," she would not be entitled to land, except on the certificate of her own government as to her identity and occupation or profession. (23 Stats. 116.)

However, if the exclusion act is intended to apply to citizens of the United States, of Chinese descent, it is so far beyond the power of Congress to enact, and therefore unconstitutional and void. The constitution declares (Art. 1, sec. 9): "No bill of attainder or *ex post facto* law shall be passed."

A bill of attainder is a special act of the legislature which inflicts punishment without a judicial trial. If the punishment is less than death, the act is called a bill of pains and penalties. (*Cummings v. Missouri*, 4 Wall. 333.) The phrase, "bill of attainder," as used in the constitution, includes bills of pains and penalties. (*Fletcher v. Peck*, 6 Cranch, 138.)

Banishment or exile is a recognized mode of punishment. (Rap. & Law Dict. Banishment.) The bill against the Earl of Clarendon, passed in the reign of Charles the second, enacted that the earl should suffer perpetual exile, and be forever banished from the realm. (Hume's History, England.)

A legislative act which undertakes to inflict the punishment of banishment or exile from the United States, on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder within the clause of the constitution of the United States, prohibiting the passage of such bills, and is therefore void.

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CALIFORNIA.

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IAN, District Judge.

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The petitioner is a Chinese laborer, a subject of the empire of China. He resided in the state of California, and followed the occupation of laborer, at San Francisco, California, from 1875 until June 2, 1887. On the last-named day he departed from San Francisco for China, on the steamship Gaelic, having in his possession the certificate duly issued to him by the collector of customs of the port of San Francisco, in pursuance of the provisions of section 4 of the restriction act of 1882, as amended by the act of 1884. He sailed from Hong Kong, China, on his return to California, on the steamship Belgic, on September 7, 1888, and arrived at the port of San Francisco on October 7, 1888. On October 1, 1888, he was on the high seas, *en route* for California; and until his arrival at the port of San Francisco, at the date aforesaid, he had no notice, or means of knowledge, of the passage by Congress of the exclusion act, which became a law on October 1, 1888. On his arrival at San Francisco, he presented to the customs officers his certificate so duly issued to him, as aforesaid, on his departure, under section 4 of the restriction act, as amended in 1884, and demanded permission to land. The collector refused to permit him to land, solely on the ground that under the act of Congress approved October 1, 1888, supplemental to the restriction acts of 1882 and 1884, the certificate was annulled and made void, and his right to land abrogated, and that the petitioner was thereby forbidden to again enter the United States. Upon these facts appearing in the petition the writ of habeas corpus was issued, and the petitioner produced in obedience to its commands.

Mr. T. D. Riordan, Mr. Lyman I. Mourey, and Mr. A. H. Ricketts, for petitioner.

Mr. J. T. Carey, United States Attorney, *contra*.

By the Court, SAWYER, Circuit Judge, after stating the facts as above. The first question arising on the facts stated, is, is the petitioner embraced within the provisions of the act of Congress approved October 1, 1888, forbidding the coming of Chinese laborers into the United States? Upon this point, it seems to us, there can be no doubt. The language of section 1 of the act, so far as it

affects the petitioner, is, "that, from and after the passage of this act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been . . . a resident within the United States, and who shall have departed . . . therefrom, and shall not have returned before the passage of this act, . . . to return to . . . the United States." And of section 2, "that no certificate of identification provided for in the fourth and fifth sections of the acts to which this is supplemental shall hereafter be issued, and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer, claiming admission by virtue thereof, shall not be permitted to enter the United States." This language is clear and exact, and is susceptible of but one construction. The act, in express and unmistakable terms, fixes the date from which it shall begin to operate, and that date is "from and after the passage of this act; that is to say, October 1, 1888, when it became a law. In equally clear and explicit terms it provides upon whom it shall operate, and that is "any Chinese laborer, who shall at any time heretofore have been . . . a resident within the United States, and shall have departed, . . . and shall not have returned before the passage of this act;" not every Chinese laborer who shall have departed and not yet have started on his return, but every Chinese laborer who shall have departed; and shall not in fact "have returned before the passage of this act." There is no possible ground under this specific language of inferring an exception in favor of those who were on the high seas at the date of the passage of the act. The act, by express provision, operates upon all within its terms from the moment it was approved by the President and became a law. Now, the petitioner had been a resident within the United States, and he had departed therefrom with his certificate duly issued in pursuance of section 4 of the prior restriction act, as amended, and he had not returned "before the passage of this act." He did not in fact return till several days after its passage. There cannot be any doubt that the act operates upon him, and, this being so, under section 1 it is unlawful for him to return to the United States, and by section 2 his certificate is declared to be "void, and of no effect," and it is provided that he "shall not be per-

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mitted to enter the United States." To admit him, therefore, would be to directly violate the unmistakable provisions of the statute. But it is said it would be a great hardship and a violation of the faith of the nation to, now, shut out those who were already on the way, relying upon the treaties and law as they were when they left China upon their return voyage without any means of notice of the change until their arrival. Be it so. That is no concern of the courts acting judicially, except so far as it bears upon the construction of the statute. The responsibility of this hardship is not upon them. They do not, and cannot, make the law. That was a consideration to be addressed to Congress and the President. It is the duty of the courts to administer, and enforce the law, as they find it. Hardship affords no justification, or authority, for the courts to take out of the provisions of the statute by forced construction, matters that Congress clearly, and, unmistakably, intended should not be excepted. That Congress intended no such exceptions, is not only apparent from the clear, and unambiguous language used, but from its own action during the course of the passage of the bill through Congress, and by the subsequent action of both the executive, and Congress. One of the grounds of a motion to reconsider in the Senate before final action on the bill, was, that, there might be an opportunity to provide an exception of this very class of cases, but that body refused to reconsider for that purpose. So the President, in his message accompanying his approval, noticed the broad terms of the act, and suggested the immediate passage of another act, or joint resolution making this very exception; but Congress declined to act upon the suggestion. It is evident, therefore, both from the language of the act, and the action of the President and Congress, that no such exception was intended. It would be a gross assumption of authority for the court to now ingraft this exception, so repudiated, upon the act.

It is next urged with great zeal by petitioner's counsel, that, if the petitioner is within the scope of the act, then, the act is unconstitutional, and void — *First*, as divesting a right indefeasibly vested under the treaties and laws passed in pursuance thereof; *secondly*, as being an *ex post facto* law within the clause

of the constitution providing, that, Congress shall have no power to pass *ex post facto* laws. The certificate, it is urged, is a contract entered into between the United States and the petitioner in pursuance of the restriction act, which vests him with a right that cannot now be divested under the general principles of public justice, even though the constitutional provision against passing laws impairing the obligation of contracts is, in terms, only restrictive upon the states. We think this is not the correct view. There is no contract between the United States and individual Chinese laborers at all. The Chinese laborers obtain no rights under the acts of Congress beyond what is secured to them by the treaties. There is no consideration moving from them, individually, or, collectively, under the act of Congress, upon which a contract was founded. All the rights they have are derivative, merely, resting upon the stipulations of the treaty between the two governments, which are the contracting, and only contracting parties. Instead of enlarging their rights, the acts of Congress are restrictive in character, and the restrictions were adopted in pursuance of the agreement allowing such restriction in the last treaty. The certificates are mere instruments of evidence, issued to afford convenient proof of the identity of the party entitled to enjoy the privileges secured by the treaties, and to prevent frauds, and they are so designated in the last act. The act, in fact, restricted the evidence upon which their rights and privileges could be established. Before the passage of the restriction acts, Chinese laborers could be admitted on any evidence competent under the ordinary rules of evidence; now, by the act of 1884, they are limited to the particular certificate prescribed. It was not a contract in any proper sense, but, only an instrument of evidence to establish the identity of the party already entitled to certain privileges under the compact, not between them and the United States, but between the two contracting governments. There was no mutual consideration, or discussion of the terms of a contract between the United States and Chinese laborers, who were affected by the restriction acts. There was no meeting of two minds on the terms of an agreement. The Chinese laborers were not consulted, at all, in the matter. The restriction acts and certificates provided for

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therein, are simply sovereign commands and prohibitions, to which the Chinese laborers affected were compelled to submit, willing, or unwilling. To call these acts and certificates provided in pursuance thereof a contract, would be an abuse of language. As between the two governments, treaties are laws, and they confer rights and privileges as long as they are in force, and, doubtless, some rights accrue, and become vested, by covenants, or stipulations that have ceased to be executory, and become fully executed, and the rights indefeasibly vested, as in the case of title to property acquired thereunder. But we do not regard the privilege of going and coming from one country to another as of this class of rights. The being here with a right of remaining is one thing, but voluntarily going away, with a right at the time, to return, is quite another. The right of Congress to legislate in such manner as to control, and repeal stipulations of treaties granting this latter class of rights, was clearly recognized in the *Ah Lung Case*, 9 Sawy. 308; 18 Fed. Rep. 28, decided by Mr. Justice FIELD, and concurred in by myself. Says the court:—

“A treaty is in its nature a contract between two nations, and by writers on law is generally so treated, and not as having of itself the force of a legislative act. The constitution of the United States, however, places both treaties and laws made in pursuance thereof in the same category, and declares them to be the supreme law of the land. It does not give to either a paramount authority over the other. So far as a treaty operates by its own force, without legislation, it is to be regarded by the courts as equivalent to the legislative act, but nothing further. If the subject to which it relates be one upon which Congress can also act, that body may modify its provisions, or supersede them entirely. The immigration of foreigners to the United States, and the conditions upon which they shall be permitted to remain, are appropriate subjects of legislation, as well as of treaty stipulation. No treaty can deprive Congress of its power in that respect. As said by Mr. Justice Curtis, in the case of *Taylor v. Morton*: ‘Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while

they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and nobody other than Congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects which the constitution has placed under that legislative power.' (2 Curt. 459.) An act of Congress, then, upon a subject within its legislative power, is as binding upon the courts, as the treaty on the same subject. Both are binding, except as the later one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the legislative department, it may present its complaint to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects require. The courts cannot heed such complaint, nor refuse to give effect to a law of Congress, however much it may seem to conflict with the stipulations of the treaty. Whether a treaty has been violated by our legislation, so as to be the proper occasion of complaint by the foreign government, is not a judicial question. To the courts it is simply a case of conflicting laws, the last modifying, or superseding the earlier."

This same principle was stated by me again in *Ah Ping's Case*, 11 Sawy. 20, 21; 23 Fed. Rep. 329. In the *Head Money Cases*, 112 U. S. 598, the supreme court cites the case of *Ah Lung*, *supra*, upon the point stated in the passage quoted, and approves the doctrine stated, adding:—

"It is very difficult to understand how any different doctrine can be sustained. A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If this fail its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as

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between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that 'this constitution, and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty then is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government, by which the treaty is made, which gives it this superior sanctity. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

This doctrine was again repeated at the last term of the supreme court, with emphasis, in *Whitney v. Robertson*, 124 U. S. 193, 195. The court closes the decision with these conclusions:—

"It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed in the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will."

The *Cherokee Tobacco Case*, 11 Wall. 616, and *United States v. McBartney*, 104 U. S. 621, 622, establish the same doctrine.

See, also, *United States v. Benson*, 2 Cliff. 513, upon the question of vested rights. We are satisfied that, under the doctrine established by the cases cited, the act in question is valid in the respect stated in the first branch of the point under discussion.

In support of the proposition, that the act is an *ex post facto* law, and, therefore, unconstitutional, counsel for petitioner rely upon the cases of *Cummings v. Missouri*, 4 Wall. 286, and *Ex parte Garland*, 4 Wall. 333. We were familiar with those cases, but we have examined them carefully, and are of opinion that they do not touch this case. We do not find any element of an *ex post facto* law in the act now in question. There is nothing in the nature of an offense in a Chinaman's departing from the country, and his departure is not made an offense; and there is nothing in the nature of punishment or of a penalty imposed for the act of having departed from this country, in providing, in the interest of the people of the United States, under a change of public policy, that he shall not return. There is simply a repeal by Congress of a prior law found in the stipulations of the treaty with China. We have heretofore found it our duty, however unpleasant at times, to maintain, fearlessly, and steadily, the rights of Chinese laborers under our treaties with China, and the acts of Congress passed to carry them out. That we have been right in law is established by the fact that our decisions have been affirmed by the supreme court of the United States on every point of law and construction of the act that has been raised, or discussed before us in the courts, and taken to that tribunal for its consideration. *That we have been right in fact, as well as in law*, in the view we entertained of the intention of Congress, as expressed in the several restriction acts, is abundantly evidenced by the fact that at every session since our construction of the acts passed was made public in *Ah Quan's Case*, 10 Sawy. 223; 21 Fed. Rep. 182, more than four years ago, Congress has persistently refused to pass any law which conflicted with the stipulations of our treaties with China until the act now under consideration was hastily passed, after the government had failed to secure the desired objects by further treaty stipulations, without a violation of those already existing. As we faithfully enforced the laws, as we found them, when they

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Points decided.

were in favor of the Chinese laborers, we deem it, equally, our duty to enforce them in all their parts, now that they are unfavorable to them. In view of what has heretofore occurred with reference to the administration of our treaties and laws upon the subject under consideration, we deem it proper to express the hope, that, so long as we sit upon the judgment seat, we shall be endowed with sufficient courage and firmness to administer honestly and faithfully, according to its true import, any valid law that Congress may, in its wisdom, see fit to enact upon this, or any other subject. That is what the judicial department of this government is established for, and when it ceases to perform its whole duty, fearlessly, and, persistently, by reason of popular clamor, or other improper outside influences, it will have ceased to perform its proper functions, and failed to answer the purposes of its creation. It is not the function of the courts to abrogate an unsatisfactory law, by, arbitrarily, refusing to enforce it. The only proper mode of getting rid of such a law, is, for Congress to repeal, or modify it. We entertain no doubt, that the act in question is valid, and that the petitioner is expressly forbidden by its terms to enter the United States, and that it would be unlawful for him to do so. The result, is, that he is not unlawfully restrained of his liberty, and that he must be remanded; and it is so ordered.

UNITED STATES v. COOK ET AL.*

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

OCTOBER 15, 1888.

1. PUBLIC LANDS—OFFENSES—FENCING—INDICTMENT.—An indictment for fencing public lands in violation of 23 Stats. U. S., page 322, section 3, need not allege that defendant had not gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith, that being a matter of defense.

Before Ross, District Judge.

Indictment for fencing public lands.

* *Contra*, see *United States v. Felderswald*, 36 Fed. Rep. 490.

The District Attorney, for the United States.

Mr. Stephen M. White, for defendants.

ROSS, J. In his brief filed in this case the district attorney concedes that if it is necessary that the indictment should negative the proviso contained in the section of the statute upon which it is founded, the demurrer of the defendants should be sustained, inasmuch as the averments in that behalf are insufficient; but he insists that such negation is not necessary, and that therefore the averments respecting that matter should be disregarded as surplusage, and the demurrer be accordingly overruled. The indictment is based upon section 3 of the act entitled "An act to prevent unlawful occupancy of the public lands" (23 Stats. U. S. 322), and reads as follows:—

"That no person, by force, threats, intimidation, or by any fencing or enclosing, or any other unlawful means, shall prevent or obstruct, or shall combine or confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands, provided this section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith."

The real question is whether the proviso is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts which constitute it. If it is, it is necessary that the indictment should negative the proviso; otherwise the latter is matter of defense to be shown by the defendant. (*United States v. Cook*, 17 Wall. 168.) Looking at the statute it is seen that the section to which the proviso is appended defines the acts which constitute the offense, and defines them completely, without any reference to the proviso, or to any matter contained in it. There is nothing in the proviso that enters into the offense condemned, but its sole office is to exempt from the operation of the section those persons who have gone upon, improved, or occupied such public

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lands under the land laws of the United States, claiming title thereto in good faith. That that is a matter to be shown in defense seems to me to be clear. If the defendant comes within the exemption it is an easy matter for him to show it; whereas if the prosecution should be required to allege, and consequently to prove that defendant did not go upon, improve, or occupy the land under the land laws, claiming title thereto, in good faith, it would be casting upon the government the burden of proving a difficult negative, and I think the statute was wisely so framed as to leave it to the defendant, if he falls within the exemption, to show the fact. As the averments in respect to the matter referred to were unnecessary, they may be disregarded as surplusage. It is not claimed that the indictment contains any other defects. Demurrer overruled.

IN RE TONG WAH SICK ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 17, 1888.

1. CHINESE—EXCLUSION ACT OF 1888—DEPARTURE FROM UNITED STATES.—Chinese subjects purchasing through tickets, and embarking in an American vessel, from one American port to another, who do not leave the vessel when she, having leave to do so, touches at a foreign port, have not departed from the United States within the meaning of the Chinese exclusion act of Congress of October 1, 1888.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge..

On habeas corpus.

Mr. T. D. Riordan, for petitioner.

Mr. John T. Carey, United States Attorney, *contra*.

By the Court, SAWYER, Circuit Judge. The three petitioners being Chinese subjects, residents of Washington territory, embarked on the American steamship *Umatilla* for San Francisco, Cal., since October 1, 1888, having purchased a through ticket. The steamship, with leave to do so, touched at Victoria, B. C., but the petitioners did not go ashore, or leave the ship. On her:

Points decided.

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arrival at San Francisco, the collector of the port refused to permit the petitioners to land, on the ground that they had departed from the United States since the passage of the late exclusion act, the ship having stopped at a foreign port, and that the late act forbade their return. We are satisfied that there was no departure from the United States, within the meaning of the act. They left one American port for another, upon a through passage upon an American vessel, without any intention of landing in any foreign country. They were all the time within the jurisdiction of the United States, and, constructively, in the territory of the United States. An analogous question was decided by Mr. Justice FIELD, with the concurrence of the circuit judge, in the *Case of Ah Sing*, the Chinese cabin waiter, in 7 Sawy. 537; 13 Fed. Rep. 286; and the *Case of Ah Tie et al.*, the Chinese laborers, 7 Sawy. 542; 13 Fed. Rep. 291. This is a stronger case in favor of petitioners. The petitioners are, therefore, unlawfully restrained of their liberty, and must be discharged, and it is so ordered.

THE T. F. OAKES—JOHN RAFTERY ET AL., LIBELLANTS.

DISTRICT COURT, DISTRICT OF OREGON.

OCTOBER 18, 1888.

1. DISCHARGE OF SEAMAN. — A consular officer of the United States may discharge a seaman, on the application of the master, for any cause sanctioned by the usages and principles of maritime law, as recognized in the United States, on the payment of the wages then earned; and all claim for wages for the remainder of the voyage is thereby cut off and barred.
2. CAUSE OF DISCHARGE. — A premeditated and persistent shirking and slighting of duty, or a deliberate and continued attitude of insolence and defiance by a seaman, is a sufficient cause for discharge, particularly when it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty.
3. CONSULAR CERTIFICATE OF DISCHARGE. — A consular certificate of the discharge of a seaman on the application of the master is only *prima facie* evidence of the material facts stated therein; and in a suit for wages for the unperformed part of the voyage by the discharged seaman, it may be shown that such discharge was illegal, or without sufficient cause.

Before DEADY, District Judge.

Mr. John H. Woodward, for the libellants.

Mr. Edward N. Deady, for the defendant.

DEADY, J. This suit is brought by the libellants, John Rastery and Jorgen Olsen, against the ship T. F. Oakes, to recover the sum of \$150.65 each, alleged to be due them as wages for services, as seamen thereon.

It is alleged in the libel that on May 25, 1888, the libellants shipped on the Oakes, then lying at the port of San Francisco, for a voyage from there to Nanaimo, British Columbia, thence to Acapulco, and thence to a port of discharge on the west coast of the United States—the voyage not to exceed six months; that on said day the libellants agreed with the master of the Oakes, Edward W. Reed, to serve as able-bodied seamen on said voyage at the wages of \$40 a month, and signed articles to that effect; that the libellants performed their agreement, as seamen on board said vessel, until it arrived at Acapulco, when and where the master put the libellants ashore, without just cause, and without the payment of their wages; that the Oakes arrived at Portland on September 17, 1888, when and where she completed her voyage and is now lying; and that the premises considered, the libellants are each entitled to recover the sum of \$150.65.

The answer of the master and claimant, E. W. Reed, admits the allegations of the libel, as to the voyage of the Oakes and the shipment of the libellants as seamen thereon, but denies that the libellants performed their agreement, or that they were discharged without just cause or without the payment of wages, or that there is anything due either of them on account of the voyage.

It is also alleged in the answer that during all the voyage the libellants were insubordinate and refused to obey the lawful commands of the officers of the vessel; and by persuasion and threats prevented the rest of the crew from doing their duty thereon; that on account of said insubordination and misconduct, the libellants were taken before R. W. Loughery, the United States consul at Acapulco, Mexico, where they were “discharged and paid in full all wages due them,” on “account of said insubordination and continued disobedience to the lawful commands of the officers of the vessel.”

The shipping articles, in addition to the description and duration of the voyage, provide that the crew must "load and unload all cargoes if required," "bend and unbend sails, trim, coal, and dock the ship at her port of discharge if required, or pay for the same being done;" and that "no dangerous weapons or grog allowed, and none to be brought on board by the crew," nor any "money advanced during the voyage."

The articles also contain the general stipulation in the form of the agreement given in the table A of the schedule to the shipping act just following section 4612 of the Revised Statutes, to the effect that the "crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands" of their superior officers, "whether on board, in boats, or on shore."

Attached to the articles is a certificate, dated August 11, 1888, given under the hand and seal of the United States consul at Acapulco, Mexico, R. W. Loughery, to the effect that the libellants, on July 26th, "were duly discharged" at that port from the ship T. F. Oakes of New York, "according to law," "for insubordination," the master, E. W. Reed, "having deposited in this consulate" the sum of \$82.66 as wages for each of them, and \$80 extra wages.

It also appears from the testimony of the libellants that they are members of what is called "the Coast Seamen's Union of the Pacific Coast." A letter was found by the mate in the fore-castle of the vessel at this port, dated "August 9, 1888," and addressed as follows: "John Raftery and crew of T. F. Oakes, Dear Comrades." It purports to be written by one "H. Furwell" on paper with the title of this "union," and the words, "Headquarters, San Francisco, California, 613½ East Street," printed at the head of the sheet.

It reads as follows: "Your letter from Acapulco has come to hand, has been read in here in the office a dozen times, and has caused much merriment. It was thought here that he (the master of the Oakes) would try to get rid of you, and evidently he is trying pretty hard, but the policy which you have followed will make that just about impossible. With reference to weigh-

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ing out the provisions for each man, Hutton says there are no law on the point, and no decisions either, and that the point is a delicate one and had better not be touched; but one man should be present to see provisions weighed. About keeping up on afternoon watches, he says that Hoffman held that when work was necessary the men will have to do it, and, further, that the men are not competent to judge whether it be necessary or not; so you, inasmuch as it will be a judge and not a jury's decision you would have in any suit for wages, it would not be safe to try. You have your *medicen* though, first in the coals and then at anything which comes along. You know as long as you pretend to work, as long as you make an effort, no matter how small, he can do nothing; as long as you work he can do nothing. If only twenty-five tons of coal get out per day you are doing as much as you can, you know, and that settles it.

"In taking in sails you may be an hour to do what could be done in five minutes. You may be four hours hoisting a top-sail, and he can do nothing; if his sails blow away you cannot help it, and so forth. You know pretty well how to do that, anyhow." Then follows a page or so on the state of the sailor market in San Francisco, and the prospect for the winter.

A certificate under the hand and seal of the same consul at Acapulco, on August 15, 1888, addressed "To whom it may concern," was offered in evidence. It is to the effect that the Oakes arrived at that port on July 21st, with a crew reported by the master "as disposed to resist discipline and refuse duty;" that the libellants "were supposed to be the ringleaders, and after two or three days were discharged and paid off, believing that when they were removed there would be peace; on the contrary, the next day nearly all the men refused duty," naming them. The master "was compelled to hire men from shore to unload the coal, of which there were 3,000 tons on board. The obdurate seamen refusing duty were sent to prison by me, and were kept confined by the captain of the port until the ship was ready for sea."

The libellants admit that soon after the arrival of the vessel at Acapulco they were taken before the consul at that port, and there discharged by the master, with the consent of the consul,

for insubordination, and that the consul afterwards procured a passage for them on the steamer to San Francisco and tendered them the balance of the wages deposited with him, which they refused to take.

By the general maritime law a master is authorized to discharge a seaman at either a foreign or domestic port for continued disobedience or insubordination, and such discharge terminates the relation of such seaman to the vessel and his right to compensation for the unperformed part of the voyage. (*Hutchinson v. Coombs*, Ware, 70; 2 Parsons on Shipping and Admiralty, 80.)

By section 4580 of the Revised Statutes, as amended by the act of June 26, 1884, a consul is authorized to discharge a seaman on the application of the master, or that of the seaman. The causes for which he may discharge on the application of the seaman are specified, but not in the case of the application by the master. In either case, before a discharge is made, the consul must require of the master payment of the wages then due the seaman; but as I read the statute, the payment of extra wages is not required where a seaman is discharged for misconduct. Nor should it be. There is no ground on which such a seaman is entitled to any such consideration.

By section 1752 of the Revised Statutes, the President is authorized to prescribe regulations concerning the duties of consular officers. In the book of "Consular Regulations," approved on February 3, 1888, it is stated (sec. 178) that a master cannot lawfully discharge a seaman in a foreign port without the intervention of a consular officer, and that one of the usual cases in which a seaman may be discharged is his "misconduct." It is also provided therein (sec. 181): "When a seaman is discharged in a foreign port, it is the duty of the consular officer to attach a certificate thereof to the crew list and shipping articles," for which a form is given on page 573.

It appears, then, that the discharge of the libellants, at Acapulco, was in due form; and the only question is, was it done on sufficient cause, and what is the effect of it.

The causes for which a seaman may be discharged on the master's application, not being specified in the statute, must needs be, in the language thereof, such as are sanctioned by

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“the principles or usages of maritime law, as recognized in the United States.”

In my judgment a premeditated and persistent shirking and slighting of duty, as well as a deliberate and continued attitude of insolence and defiance to his superiors, on the part of a seaman, is such a cause, particularly where it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty. Such conduct is, in effect, disobedience and insubordination in its most injurious and provoking form.

The certificate of the consul is not conclusive evidence in this suit on that point, but it is *prima facie* evidence that the libellants were duly discharged for insubordination. In the case of the steamer *Uncle Sam*, 1 McAll. 77, it was held that the certificate of the consul, to the discharge of the seaman, does not preclude the court from inquiring into the cause of the discharge. But the certificate is made by a public officer, in pursuance of a statute, and is therefore *prima facie* evidence of the pertinent or material facts contained therein, as against the libellants. (1 Wharton on Evidence, secs. 640–643; *The Nith*, ante, 368, 481; 36 Fed. Rep. 86, 383.)

And first as to the letter from the secretary or agent of the “Coast Seamen’s Union,” H. Furwell. There is no doubt in my mind of its genuineness. The internal evidence is very satisfactory. And it is equally clear that it was written in reply to one from the libellant Rastery, as spokesman for the crew, from Acapulco, detailing the progress of the voyage, including the contest with the master for the rule of the vessel. But it is quite certain that the libellants never saw the letter, as they left Acapulco for San Francisco at the date of it. Under the circumstances it is fair to presume that it was delivered to some of the “crew,” to whom it was addressed, as well as Rastery. However, it betrays the *animus* and ideas of the “union,” of which these libellants are members and co-workers, and plainly discloses the illegal and dishonest practices and conduct to which a crew of that kind might and would resort, for the purpose of having their own way “on board ship,” and getting along with as little work as possible.

The letter is material as showing the probable character of

Rastery's to the "union," to which it is a reply, as well as the probable state of mind and sense of duty, or want of it, in which the libellants went on board the *Oakes*. They already knew, as the letter states, how to idle along and consume a day in discharging 25 tons of coal instead of 250, to be an hour taking in sails that could be done in five minutes, to be four hours hoisting a top-sail, or let the sails blow away.

The oral evidence consists of the testimony of the libellants on their own behalf and that of the mate, who was also discharged, with his consent, at the same time they were; and the testimony of the master and the second mate, now mate, for the claimant.

The libellants are young men. Rastery is entered in the articles as of New York, aged twenty-seven years, and says he has been two and a half years on this coast. Olsen is entered as of Norway, aged twenty-two years. He says he has been five years at sea and two on this coast. He is apparently candid and outspoken, and while claiming that he did his duty, substantially admits several instances of gross misconduct. Rastery is sullen and taciturn, and denies most of the instances of misconduct alleged against him in the testimony of the master and second mate.

The first mate appears to be a pleasant, plausible man, about fifty-five years of age, with considerable experience at sea. On his examination in chief he stated unqualifiedly that the crew was a good one and did their duty well, and that there was much complaint of the food on the ship. But on cross-examination he was forced to admit that the trouble about the food was not during the voyage, but only at Nanaimo while the vessel was loading with coal, and that the material was sufficient in quantity and quality, but it was not well cooked; and also that he had made an entry in his log charging Olsen with misconduct and insolence to the master in the Strait of Fuca and signed one to the same effect, and more in the official log of the ship. My impression is that he is more concerned to support the case of the libellants than to tell the whole truth.

The treatment of the crew by the master and his officers was kind and considerate. The ship was well provided, and the

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voyage does not appear to have been a hard one. No complaint of any specific ill-usage or injury is made by or for any one.

Raftery was in the habit of putting himself forward as spokesman for the crew, or any member of it, whenever an opportunity offered. He once said to the second mate, apparently in justification of such impertinence, that a "union" crew always had a leader, and he was the leader of that crew.

On one occasion when the yards were being braced, the second mate said to the men handling the braces or ropes, "Run!" Raftery, who was next to the block, said, "No, don't run!" and the men didn't run.

On another occasion he refused to help serve out water because it was not yet six o'clock, as it was contrary to the coast rule to "turn to" before that time.

On the first day out from San Francisco, Olsen produced a loaded revolver and discharged three barrels over the fore-castle head. The master ordered him to give up the pistol, which he refused to do, until the articles were shown him, prohibiting the bringing of any "dangerous weapon" on board. His conduct in this matter was lawless and defiant. Presumably, the articles were read to him by the shipping commissioner when he signed them, and he brought the weapon on board, knowing he had no right to do so, and afterwards wilfully discharged it in the face of the crew, apparently as a matter of bravado.

On coming out of the Strait of Fuca, on the voyage from Nanaimo to Acapulco, Olsen was at the wheel and steered so as to let the tug come broad on the bow of the vessel. The master called his attention to it. He answered, "All right," but did not change his wheel, as the master thought he should, when the latter said, "Put your wheel over," to which Olsen replied in an offensive manner, "I can steer as well as you can." Thereupon the master called another man to the wheel, who impudently said to him, "Olsen is as good a seaman as there is on the ship." On this the master called the crew aft and said "he expected proper respect from them," which they all promised except Olsen, who said if the master did not treat them well they would make it cost him \$100 a day when dis-

charging cargo; that they could put out 50 tons or 500 a day just as they liked.

A short way out from Acapulco, the vessel lost three sails in a squall at night, which the second mate thinks was largely attributable to the slowness and the indifference of the crew.

The Oakes arrived at Acapulco on July 21st, and commenced discharging her cargo of coals with the aid of steam-power, the tubs being filled in the hold by the crew. And here both Raftery and Olsen persistently shirked the labor at which they were set, of filling the tubs. Instead of filling a shovel with coal and putting it directly in the tub, they would slowly get a half shovel full and lifting it up leisurely, turn around, and rest it on the edge of the tub while they looked about, and then dribble it into the tub. On one occasion the second mate looking down the hatchway and seeing Raftery "soldiering" with his shovel, asked him ironically and reproachfully, "Don't you want a spoon?" to which the latter impudently replied, "I don't care if I do."

Finally, on July 26th, the libellants were taken by the master before the consul at Acapulco, and after an examination of the parties by that officer they were discharged from the ship for insubordination and paid off; the amount of the wages for two months and two days, and one month's extra wages being paid to the consul for them, as the law and regulations require.

Afterwards, on August 9th, the consul furnished them a passage on the regular steamer to San Francisco, and I suppose paid their expenses while on shore, as the law also requires, and tendered them the balance of their wages, which they refused.

The certificate of the consul is *prima facie* evidence of the justice of the discharge. And although this court may in this suit go behind it, and, on a proper case, determine otherwise, yet the proof must be sufficient to overcome the *prima facie* case. The consul has the parties before him face to face, while the matter is fresh in the minds of all parties, and the truth is most likely to come to the surface, and his action should not be lightly disregarded or set aside. I am satisfied that his action in the premises was just and proper.

I have taken more pains and time with this case than the

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intrinsic difficulty of it demands. My reason for so doing is that I am strongly impressed with the idea that the whole trouble grows out of the methods and purposes of the Seamen's Union of San Francisco. It appears to be organized for the purpose of controlling the conduct and employment of seamen on this coast, to the end that ships shall be navigated in the interest and at the pleasure of the forecastle, without any reference to the rights or interests of owners.

Acting on this anarchical idea, these libellants undertook to administer to the master the prescribed "medicine" for his refusal to submit to their dictation, by loitering and trifling over their work in discharging cargo at the expense of the ship.

But the law will not tolerate such conduct. The contract of the libellants bound them to be diligent and obedient in the discharge of their duties. They wilfully and persistently violated this contract, and were properly discharged and paid off, getting even one month more wages than they were entitled to.

The decree of the court will be that the libel be dismissed, and that the claimant recover his cost.

SCHWERIN v. NORTH PACIFIC C. R. Co.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 22, 1888.

1. SHIPPING—CARRIAGE OF PASSENGERS—NUMBER—PENALTY—FERRY-BOAT.—Revised Statutes, United States, sections 4464-4466, respecting the number of passengers that may lawfully be carried by a passenger steamer, have no application to a ferry-boat, though temporarily employed as an excursion boat.

Before HOFFMAN, District Judge.

Mr. Milton E. Babb, for complainant.

Messrs. Page & Eells, for defendant.

HOFFMAN, J. The complaint in this case is filed by an informer seeking to recover certain penalties imposed by sections 4464 and 4465, United States Revised Statutes, for violations of their provisions.

The violations complained of are alleged to have been committed by the steamer Tamalpais, a regularly licensed ferry-boat, plying between this port and Sausalito.

She was, however, frequently employed as an "excursion boat," and on such occasions procured from the inspectors a permit specifying the number of passengers she was authorized to carry, the number and kind of life-saving apparatus, etc., etc., to be carried, and the route and distance for such excursions.

These permits were issued, it is presumed, under the supposed authority of section 4466.

It is contended that on one of these excursions she carried more passengers than was allowed by the permit.

Sections 4464 and 4465 are as follows:—

Section 4464. "The inspectors shall state in every certificate of inspection granted to steamers carrying passengers, *other than ferry-boats*, the number of passengers of each class that any such steamer has accommodations for and can carry with prudence and safety."

Section 4465. "It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection, and for every violation of this provision the master or owner shall be liable to any person suing for the same to forfeit the amount of the passage money, and ten dollars for each passenger beyond the number allowed."

By section 4469 this penalty is declared to be a lien upon the vessel.

It is evident that these sections have no application to ferry-boats when employed as such, and, in fact, the certificate issued to a boat of that class contains no statement of the number of passengers she is entitled to carry.

But it is contended that the steamer Tamalpais by forsaking her ferry route, and engaging in the carrying of passengers "on excursions," ceased *pro hac vice* to be a ferry-boat, and became subject to the provisions of law intended to secure the safety of passengers taken on board "steamers carrying passengers."

That they ought to be subjected to those provisions cannot be doubted.

But there is much difficulty in applying the provisions of the

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sections I have quoted to ferry-boats, which, on occasions more or less rare, are used in carrying passengers on excursions, but which ordinarily and habitually are employed only as ferry-boats.

The provisions with regard to passenger steamers engaging in excursions are contained in section 4466, and are as follows:—

“If any *passenger steamer* engages in excursions, the inspectors shall issue to such steamer a *special permit in writing* for the occasion, in which shall be stated the *additional number* of passengers that may be carried, and the number and kind of life-saving appliances that shall be provided for the safety of such additional passengers; and they shall also, in their discretion, limit the route and distance for such excursions.”

It will be noted that this section does not (except by implication) forbid the carrying of passengers on excursions in excess of the number allowed by the certificate of inspection, plus the number of additional passengers allowed by the “special permit in writing.” Nor does the section impose, as does the preceding section, any penalty or forfeiture for a violation of its provisions.

Section 4469 declares the penalties imposed by section 4465 (which forbids the carrying of a greater number of passengers than is stated in the *certificate of inspection*) to be a lien on the vessel, but it makes no mention of any penalties or liabilities incurred by carrying a greater number of *additional* passengers than that allowed in the special permit for excursions.

Sections 4464, 4465, and 4466, by their terms, or by necessary construction, apply exclusively to “steamers carrying passengers,” or passenger steamers, “other than ferry-boats,” and the certificates of inspection issued to these vessels are required to state the number of passengers such steamer can safely carry.

Section 4465 declares the penalty incurred by taking on board more passengers than is stated in the certificates of inspection.

When engaged in excursions, the “passenger steamers” may obtain a special permit for the excursion, in which shall be stated the *additional* number of passengers that may be carried on the excursion, etc., etc. Additional to what? Plainly additional to, or in excess of, the number stated in the certificate of inspection.

But the certificates of inspection issued to ferry-boats do not, and are not required to state, *any* number of passengers they are

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entitled to carry. How, then, if engaged in excursions, can they be said to have carried any greater number of passengers than is stated in their certificates of inspection, or (if a permit has been obtained) any number of passengers greater than the number mentioned in the permit as additional to the number stated in the certificate of inspection?

It is plain, I think, that these sections cannot be applied to ferry-boats carrying on excursions a greater number of passengers than that authorized by their permits. A law authorizing permits to be issued to ferry-boats, and perhaps tug-boats and freight-boats engaged on excursions, specifying the number of passengers they are entitled to carry, and imposing penalties for its violation, might be desirable and salutary.

But I am unable to see how the section of the Revised Statutes, under which this action is brought, can be made to reach the case.

It is said that a ferry-boat licensed only as such, when engaged on excursions, becomes *pro hac vice* a passenger-boat.

If this be so, the ferry-boat so engaged may possibly be considered as employed without having a license in force. Section 4324 provides that "no license granted to any vessel shall be considered in force . . . for carrying on any other business or employment than that for which she is specially licensed."

But this point it is unnecessary to consider, as this suit is not brought for any such violation of law, but for the penalty imposed by section 4465 of the Revised Statutes.

The demurrer is sustained.

IN RE JACK SEN ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

OCTOBER 24, 1888.

1. CHINESE — EXCLUSION ACT OF 1888 — CHINESE SEAMEN. — A Chinese laborer, who ships on an American vessel at an American port, for a round voyage, and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States within the meaning of the exclusion act of October 1, 1888.

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Before SAWYER, Circuit Judge.

Habeas corpus.

Mr. T. D. Riordan, for petitioners.*Mr. J. T. Carey*, United States Attorney, *contra*.

SAWYER, Circuit Judge. The petitioners are ten Chinese laborers, subjects of the emperor of China. They were in the United States on November 17, 1880, and have been residents of the country ever since. On August 29, 1888, the petitioners, at the port of San Francisco, shipped on board the steamship Colima, as part of the crew, for a voyage from said port to the port of Panama, in the state of New Granada, and return to San Francisco, the shipment being for the round voyage, and San Francisco the port of their discharge. The steamship Colima is an American vessel, sailing under the American flag, regularly engaged in the transportation of passengers and merchandise between the said ports of San Francisco and Panama. The said vessel sailed from the port of San Francisco for Panama and return on August 30, 1888, having said petitioners on board, as a part of her crew for the round voyage. She arrived at Panama on September 22, 1888, and sailed from Panama on October 1, 1888, on her return voyage to San Francisco, where she arrived on October 21, 1888, with said petitioners on board, as a part of her crew, the said petitioners having remained on said ship, and not landed therefrom in any foreign land from the time the ship left San Francisco till her return to said port. On their return to San Francisco, the collector of the port refused to permit them to land, on the ground that they had departed from the country, and under the exclusion act passed October 1, 1888, it had become unlawful for them to return to the United States. This writ of habeas corpus was thereupon issued upon their petition, to determine their rights under the act mentioned.

The only question, is, had the petitioners departed from the United States within the meaning of that act? This is not a new question in this court. In the *Case of the Chinese Cabin Waiter, Ah Sing*, who went to Australia on the City of Sydney,

touching at various foreign ports, without the certificate required to be obtained by every Chinese laborer, who "shall depart from the United States," Mr. Justice FIELD, after an elaborate discussion of the question, with the concurrence of the circuit judge, held that the petitioner was not within the provision of the act requiring a certificate, as he was all the while upon an American vessel, upon which he shipped in the United States for the round voyage to Australia and return to an American port, where he was to be discharged. (*Case of Chinese Cabin Waiter*, 7 Sawy. 536; 13 Fed. Rep. 286.) And in the *Case of the Chinese Laborers, Ah Tie, and others*, who shipped on the same steamship at San Francisco for a voyage to Australia and return, where the petitioners went on shore temporarily, in Australia, with the permission of the captain, the same judges held, after mature consideration, that, going upon shore, not with an intent to remain ashore, under the circumstances of the case, with the permission of the captain, did not bring them within the provisions of the act. (*Case of Chinese Laborers*, 7 Sawy. 542; 13 Fed Rep. 291.) I can add nothing to the reasoning of Mr. Justice FIELD in those cases. The point is substantially the same as in this case. The petitioners in the cases cited had not departed from the United States, within the meaning of the act requiring all "departing" Chinese to obtain the specified certificate, as the only evidence of a right to return. So, in this case, the petitioners have been within the jurisdiction of the United States during their entire voyage, being on an American vessel, and, in contemplation of law, all the time within American territory, without any intention of departing therefrom. There was no departure from the United States within the meaning of the act of October 1, 1888. They are unlawfully restrained of their liberty, and must be discharged; and it is so ordered.

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Opinion of the Court—Deady, J.

THE UNITED STATES v. JOHN FELDERWARD.

CIRCUIT COURT, DISTRICT OF OREGON,

OCTOBER 29, 1888.

1. **EXCEPTIONS IN A STATUTE DEFINING A CRIME.**—Where a statute declares an act done in the absence of certain circumstances to be a crime, an indictment charging the commission of such a crime must negative the existence of such circumstances.
2. **UNLAWFUL ENCLOSURE OF THE PUBLIC LANDS.**—An indictment under the act of February 25, 1885 (23 Stats. 321), for unlawfully enclosing a portion of the public lands, must show that the defendant is not within any of the exceptions permitting such enclosure.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the United States.*Mr. James F. Watson*, for the defendant.

DEADY, J. Section 1 of the act of February 25, 1885 (23 Stats. 321), prohibits and declares unlawful, "all enclosures of the public lands . . . by any person . . . to any of which land . . . the person . . . making or controlling the enclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office, under the general laws of the United States, at the time any such enclosure was or shall be made," and section 4 of the act declares that any person "violating any of the provisions" of the act "shall be deemed guilty of a misdemeanor" and fined not exceeding one thousand dollars and imprisoned not exceeding one year.

By the indictment in this case, the defendant is accused of a violation of this statute in enclosing six hundred and forty acres of the public lands in township 20 south, of range 11 east, of the Wallamet meridian.

The defendant demurs to the indictment, because the facts stated therein do not constitute a crime.

The demurrer to the first count, because of a clerical omission, is confessed, while that to the second one is contested.

It is alleged in this count, that on August 1, 1885, the defendant "did wrongfully and unlawfully erect and construct

an enclosure on the public lands of the United States, by which he, without any lawful claim or color of title, acquired in good faith, enclosed six hundred and forty acres” of the public lands, as aforesaid.

The point made by counsel on the argument of the demurrer is, that the pleading does not negative all the exceptions contained in the statute; that it is not enough to say that the enclosure was made “without any lawful claim or color of title acquired in good faith,” but the indictment must go further, and negative the exception immediately following, by alleging that the enclosure of the land was not made under “an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States.”

It is commonly said that where an exception is contained in the exacting clause of a statute, the indictment must show that the defendant is not within it; but, if it is found in a subsequent clause or statute, then it is a matter of defense, to be shown by the accused. (*Nelson v. United States*, 30 Fed. Rep. 116.)

In *United States v. Cook*, 17 Wall. 173, it is said that the exception must not only be in the enacting clause, but must be “so incorporated with the language defining the offense, that the ingredients of the offense cannot be accurately and clearly described, if the exception is omitted.”

Dr. Wharton (Crim. Plead. sec. 241), gives this test. Does the statute create a general offense or one limited to particular persons or conditions? In the first case the exception need not be negative, while in the latter it must be. And the determination of this question does not depend on the mere structure of the statute. “If it be clear that an act is only to become a crime when executed by persons of a particular class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed.”

At the passage of the act of 1885, the public, or a large class thereof, were permitted and authorized by law to go upon and enclose portions of the public lands, with a view of acquiring title thereto under the pre-emption, homestead, and other acts of

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Congress. An enclosure made under such circumstances is made under "an asserted right" to the land, and "with a view to entry thereof at the proper land office" under the law applicable thereto. Then comes this act and prohibits and makes criminal the making or maintaining of any enclosure on the public lands under any other circumstances. This, in my judgment, leaves the matter in a similar condition to that of the sale of spirituous liquors where the same is prohibited and punishable if done without a license. An indictment for such a crime must charge that the sale was made without a license. And so here an indictment charging a person with making an illegal enclosure on the public lands should allege that the act was done without the presence of the conditions or circumstances which justify or license it.

Neither is the crime defined by the act a "general" one. The crime it defines—an enclosure of the public lands—is limited to particular persons; such as have "no claim or color of title" to the land enclosed, "made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office, under the general laws of the United States."

The form of the pleading in this respect will make but little difference in the trial of the case, as slight proof of these negative allegations will shift the burden of proof onto the defendant. But in the mean time he cannot be legally accused of unlawfully erecting an enclosure on the public lands, and put on his trial therefor, unless it appears from the indictment that he is not within the exceptions contained in the act, making such enclosure a crime. See *Nelson v. United States*, *supra*, where this question was considered by this court. The demurrer is sustained.

G. W. HUNT v. THE OREGON PACIFIC RAILWAY COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 29, 1888.

1. MEASURE OF DAMAGES FOR A BREACH OF CONTRACT.—The party injured by the breach of a contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided such damages may fairly be supposed to have been within the contemplation of the parties when they made the contract, and are certain both in their nature and in respect to the cause from which they proceed.
2. CASE IN JUDGMENT.—The plaintiff sues the defendant for damages on an alleged breach of a contract, whereby the former agreed, in consideration of certain payments to be made as the work progressed, to construct fifty-two miles of railway for the latter. The defendant sets up a counter-claim for the failure to construct the road, and claims damages therefor: (1) For the loss of the use of the road; (2) for the loss of certain freight which it had made "arrangements" to carry over the road; and (3) for the sum it will cost to complete the road in excess of the contract price. On motion of plaintiff the last two clauses were stricken out of the counter-claim; the one, as arising on a collateral contract not within the contemplation of the parties, and the other as being uncertain, and also contingent on the future construction of the road by the defendant.

Before DEADY, District Judge.

Mr. George H. Williams, for the plaintiff.*Mr. John W. Whalley* and *Mr. William T. Meier*, for the defendant.

DEADY, J. The plaintiff, a citizen of Ohio, brings this action against the defendant, a corporation formed under the laws of Oregon, to recover \$160,000 damages for an alleged breach of a contract entered into by the parties on August 8, 1887, whereby the plaintiff, for a consideration therein specified, undertook to construct two sections of the defendant's railway, on the eastern extension thereof, one of forty-two miles in length and the other of ten, the first twenty miles to be completed by November 15, 1887, the next twenty-two miles by April 1, 1888, and the last ten by May 1, 1888. The breach alleged is, that the defendant wholly failed to make payments on the work as it progressed, according to the agreement, or to furnish transportation, iron, steel, or ties, as provided therein, wherefore the plaintiff was compelled to give up the performance of the contract, after doing \$80,000 worth of work thereunder, and did quit the work on December 12, 1887.

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The answer of the defendant was filed April 5, 1888, and contains a counter-claim, miscalled a "further defense," founded on alleged breach of the contract in question by the plaintiff, wherein it is alleged that the plaintiff, after performing work and labor and furnishing material to the estimated value of \$50,643.56, failed and refused to comply with said contract, and about December 10, 1887, abandoned the same and notified defendant thereof; that the work is still unfinished, nothing having been done thereon since the abandonment by the plaintiff.

The counter-claim concludes with three demands for special damages: (1) That the work cannot now be completed in less than a year, during which time the defendant will be deprived of the "use and operation" of that portion of its road, to its damage \$50,000; (2) that the defendant, relying on the good faith of the plaintiff in the premises, made "arrangements" to carry over its road from the eastern terminus of the portion the plaintiff agreed to construct "a large amount of freight to and from the sea-board at Yaquina Bay, Oregon, during the season of 1888, to wit, to the amount of \$50,000, and that owing to the failure of the plaintiff to perform his contract the defendant cannot carry said freight, to its damage \$50,000; (3) that the defendant will be compelled to pay out large sums of money in excess of the contract price to complete the work that the plaintiff undertook, and in so doing will be put to a large amount of trouble and expense, to its damage \$100,000.

The plaintiff moves to strike out of the counter-claim each of these claims for damages, and the allegations in which they are set forth, because they are (1) "irrelevant and immaterial," and (2) "for conjectural or speculative damages."

The questions involved in this motion have been thoroughly argued by counsel. The difficulty in this and like cases lies not in the ascertainment of the law of the subject, but the application thereof. (Sedgwick on Damages, 65.)

Counsel for the plaintiff and defendant both cite and rely on the cases of *Griffin v. Colver*, 16 N. Y. 489, and *Snell v. Cottingham*, 72 Ill. 161.

In the New York case it was held that on a breach of contract to deliver a steam-engine at a certain day, for the purpose

of driving a planing mill and certain other machinery, the ordinary rent or hire which could have been obtained for the use of such mill and machinery, the operation of which was suspended for a week for want of the engine, might be recovered as damages, but not the estimate of what might have been earned by the use of the engine and machinery in the mean time, had the contract been complied with.

In the course of an able and interesting opinion in the case, Selden, J., states the general rule on the subject as follows: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained," subject to only two conditions; "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to cause from which they proceed."

In the Illinois case it was held that where a contractor fails to construct a railway within the time limited in the contract therefor, but does complete it afterwards, the measure of damages for the breach is the value of the use of the road from the time it ought to have been finished until it was done, but not the loss to the owner of the road, by reason of his inability to comply with a contract between himself and a third person for the use of the road from the time it should have been completed, even though the contractor may have known of the existence and terms of such contract, unless he expressly agreed to such a measure of damages.

And still the difficulty remains, do the damages claimed in this case flow directly and naturally from the alleged breach of the contract? and are they the proximate consequence thereof, and not speculative or contingent?

The tendency of judicial decisions seems to be in favor of allowing a party to show, if he can, that he has suffered some damage by the breach of a contract, either in gains prevented or losses sustained, whenever such gains or losses directly relate to or arise out of the subject-matter of the contract, and not something collateral thereto. (*Ruff v. Rinaldo*, 55 N. Y. 664;

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Hexter v. Knox, 63 N. Y. 561; *Hinckley v. Beckwith*, 13 Wis. 34; *Shepard v. M. Gas Light Co.* 15 Wis. 349; *Davis v. Talcott*, 14 Barb. 611; *Sedgwick on Damages*, 77; *Field on Damages*, 7, sec. 10.)

Still it has been found impracticable to devise any definite and comprehensive rule applicable alike to the facts of all cases. Therefore, in each case, the measure of damages must, to some extent, depend on its own circumstances. (*Field on Damages*, 10, sec. 13.)

The damages claimed on account of the estimated difference in the cost of constructing the road by the defendant and the contract price are, in my judgment, too uncertain to be allowed. It can only be conjectured what the cost of constructing the road some time in the future will be. Owing to the fluctuations in the price of labor and materials, it may cost more or less to construct the road in 1888-89 than in 1887-88. Besides this they are contingent. The defendant may never construct the road, and until it does, and necessarily at a greater cost than the contract price, it cannot be said to have sustained any damage by the breach.

The contract gave the defendant the right, whenever in the judgment of its general manager the work was delayed so as "to imperil" its completion within the time limited, "to assume entire control of the work" and complete it; and any outlay, so incurred by the defendant in excess of the contract price of the work, shall be a charge "against any balance" due the contractor for work done under the contract. This provision in the contract indicates plainly that the parties did not contemplate the payment of any damages for the delay or failure to construct the road, until it was ascertained by the completion of the same, what amount, if any, it cost in excess of the contract price.

The claim for \$50,000 damages, alleged to have been sustained by the defendant not being able to keep its "arrangement" to carry that amount of freight over the road in 1888, cannot be allowed. It consists of gains prevented on a collateral contract for the carriage of freight over the road by the defendant. These profits, if realized, would not have been the direct fruit of the contract between the plaintiff and the defendant. They could

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not have been within the contemplation of the parties to the contract of construction, at the time they entered into it. The authorities are at one on this point, and particularly the case of *Snell v. Cottingham, supra*.

The claim for damages for the loss of the use of the road presents a different question. Where, from the nature of the case, the value of such use can be shown with reasonable certainty, the authorities favor the allowance of the claim. (See *Griffin v. Colver* and *Snell v. Cottingham, supra*.)

It is impossible to say, on this motion, in advance of the evidence, whether, owing to the condition of this piece of unconstructed road, the defendant can show with reasonable certainty, as in the case of the rent of an ordinary house or mill, what the use of the same was or would have been reasonably worth during the time its completion was actually delayed by the failure of the plaintiff to comply with his contract, but I think it ought to be allowed to try—to have the opportunity to do so.

The counter-claim does not directly allege that the defendant is the owner or operator of any railway, of which the section the plaintiff contracted to construct is a part or extension to the eastward, but so much may be implied from what is alleged. Nor, granting the implication, does it appear therefrom where the western or other terminus of said road is, except as it may be implied from the statement in the second claim for damages, that the defendant had made arrangements to carry over said road from the eastern terminus “of the portion thereof the plaintiff agreed to build,” “a large amount of freight to and from the sea-board at Yaquina Bay.”

Under these circumstances the right of the defendant to damages for the loss of the use of the unconstructed road will depend on the nature of the case made by the evidence.

The motion to strike out is denied as to the first claim for damages and allowed as to the other two.

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Opinion of the Court—Ross, J.

THE BRUCKLAY CASTLE.

LUTTKE v. THE BRUCKLAY CASTLE.

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

NOVEMBER 5, 1888.

1. ADMIRALTY—OBJECTION TO JURISDICTION—WAIVER.—On a libel for wages, after the claimant has pleaded to the merits, and testimony has been taken on the issues made by the pleadings, it is too late to object to the jurisdiction of the court, on the ground that the wages were earned by a foreign seamen on board a foreign vessel.
2. SEAMAN—THE CONTRACT—EVIDENCE.—Where the allegations of the libel and the testimony of libellant as to the length of the voyage are contradictory, and libellant's explanations of his reasons for not leaving the vessel at the end of his alleged voyage also contradictory, the court is not justified in disregarding the written articles.

Before Ross, District Judge.

In admiralty. Libel by August Luttke against the British bark, Brucklay Castle, for wages as seaman.

Mr. W. J. Hunsaker, for libellant.

Messrs. Anderson & Story, for claimant.

Ross, J. The libellant, an ordinary seaman, signed articles for a voyage from "Penarth (Cardiff) to Montevideo, ^{and} or any ports or places within the limits of 75 degrees north and 60 degrees south latitude, the maximum time to be three years, trading in any rotation, and to end in the United Kingdom or on the continent of Europe, between the Elbe and Brest, at master's option, calling for orders if required." On the part of the claimant it is objected that, the suit being for wages earned by a foreign seaman on board a foreign vessel, the court should decline to take jurisdiction, and remit the libellant to the tribunals of his own country. But this objection was not raised until after claimant had pleaded to the merits, and until after testimony had been taken on the issues made by the pleadings. Under such circumstances the objection will not be regarded. Apart from this objection, the only defense set up is that the libellant deserted the vessel at the port of San Diego, without cause, and in violation of the shipping articles. The case had been sub-

mitted upon these articles and the testimony of the libellant. The libel, which is sworn to by the libellant, charges that libellant shipped on or about December 21, 1887, at the port of Montevideo, South America, for a voyage to the port of New Castle, New Zealand, and thence to San Diego, in the state of California, United States of America, at the agreed wages of three pounds per month, or its equivalent in lawful money of the United States, and that for the due performance of said voyage libellant signed the articles already referred to; that the bark arrived at the port of San Diego on the 27th of July, 1888, and was there safely moored; and that the term of libellant having expired, the master discharged him from the service of the said vessel without payment, after demand made, of the wages due him for the voyage.

In his testimony libellant states that he shipped for a voyage from Montevideo to New Castle only, and that the understanding between himself and the captain was that the voyage was to end at that port; that he signed the articles, but that they were not read or explained to him; and that the consul at Montevideo simply asked him his age, and where he was born, and told him to sign, which he did. Although the shipping articles are by no means conclusive as to the contract between the parties, it will not do to disregard them upon such testimony as that of the libellant in this case. When he verified the libel he swore that he shipped from Montevideo to New Castle, and thence to San Diego. In his testimony he swears that the contract was that the voyage should end at New Castle. In his direct examination he states that the reason he did not leave the vessel at New Castle was that he was sick; and added: "The captain called me aft when we were two days out at sea, and said he made a mistake in taking me out of the harbor." On cross-examination, when asked why he did not go ashore at New Castle, he answered: "The captain would [not] discharge me. He said I signed three years' shipping articles." Such contradictory statements as these show that but little reliance can be placed upon the testimony of the libellant in his own favor. And that it was not his understanding that the voyage was to end at New Castle is very clearly shown by the fact admitted by him, that, after

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Opinion of the Court—Sawyer, C. J.

reaching the port of San Diego, he sought to be discharged upon the ground that the condition of his health was such as not to permit him to continue further on the voyage. The testimony is clearly insufficient to justify the court in disregarding the written articles. That libellant deserted the bark at San Diego without any valid excuse, and was not discharged as sworn in the libel, abundantly appears from his own testimony. There should be a decree dismissing the libel at libellant's cost; and it is so ordered.

AMADOR MEDEAN GOLD MINING COMPANY v. SOUTH
SPRING HILL GOLD MINING COMPANY ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

NOVEMBER 5, 1888.

1. MINES AND MINING—MINING LODES—DIPPING INTO AGRICULTURAL LANDS.—An owner under a patent of mineral lands, including a gold-bearing vein or lode, having its apex within the boundaries of the land patented, is not entitled to follow his vein or lode down on the dip, across his exterior boundaries, into the lands of an adjacent proprietor, holding an elder title under a patent for agricultural lands.
2. PUBLIC LANDS—AGRICULTURAL LANDS—EQUITABLE TITLE.—The equitable title to public lands vests in the purchaser immediately upon the lawful entry, payment of purchase money, and issue of certificate of purchase thereon. After such entry, no proprietary or pecuniary interest remains in the United States, and no subsequent grant of any character can affect the right of such prior purchaser.

Before SAWYER, Circuit Judge.

At law. On final hearing.

Action by the Amador Medean Gold Mining Company against the South Spring Hill Mining Company and others to recover possession of property.

Messrs. Onley, Chickering & Thomas, for plaintiff.

Mr. A. C. Adams and *Messrs. Egan & Rust*, for defendants.

SAWYER, Circuit Judge. It appears from the agreed statement of facts, that one Calvin Hammack, under a warrant issued in pursuance of the provisions of the Revised Statutes relating to bounty lands for soldiers of the war of 1812, made

application, at the land office in Sacramento, to purchase from the United States certain agricultural lands, which application was approved, the payment of purchase money for the excess made, and the usual certificate of purchase issued on June 15, 1874. Afterwards, in pursuance of this entry, a patent of the United States was duly issued on September 13, 1876, embracing the premises in controversy. The title acquired by this entry, and the patent to the premises in controversy, by proper mesne conveyances, became vested in the plaintiff prior to the commission of the acts complained of, and it was in plaintiff at the commencement of this action. After the said entry and payment for the land by Hammack, and the issue of the certificate of purchase on June 15, 1874, and before the issue of said patent in pursuance of such purchase and entry, to wit, on July 18, 1876, one McKim located and acquired the right to a gold mining claim, situated on land adjacent to the lands so entered by and patented to said Hammack. Having acquired the right to the mineral location, McKim conveyed his title to the South Spring Hill Mining Company, after which, upon application regularly made, and the performance of all the conditions required by the statute, a patent embracing said McKim's mining location was duly issued to said company by the United States under the act authorizing the sale of mineral lands. All the title and rights acquired under said mineral patent were conveyed to, and became vested in, defendant, before the performance of the acts complained of. The defendant, after thus acquiring the title, proceeded to work its claim, and develop the mine; and, in so doing, discovered the apex of a vein or lode within the exterior boundaries of the location as patented. The defendant, in working this lode, followed it down on the dip, without departing therefrom until it crossed the line of the adjacent agricultural land held by the plaintiff under the said patent issued upon the entry by Hammack, and worked the lode beneath the surface within the plaintiff's land. The value of the ore removed is two hundred dollars, and of the land in dispute not less than five thousand dollars. The action is to recover possession of the portion of the premises from which plaintiff has been ousted by these acts, and damages for the injury sustained.

The only question is, whether, under the Revised Statutes, a party discovering and acquiring title by patent from the United States to a mineral gold-bearing vein or lode having its apex within the land purchased, is entitled to follow the vein or lode down on its dip, across the boundaries of his own lands into the agricultural lands of an adjoining proprietor, who has the elder title? In my judgment he, clearly, has not. The equitable title to the agricultural lands, held by plaintiff, fully vested on the entry and payment by Hammack on June 15, 1874. After that the United States merely held the dry legal title in trust for the purchaser without any pecuniary or beneficial interest in it. From the moment of the entry, payment, and issue of the certificate of purchase, these lands ceased to be public, and became private property. (*P. C. Milling & M. Co. v. Spargo*, and *Same v. Fiak*, 8 Sawy. 647; 16 Fed. Rep. 348, and cases cited; also, *Wirth v. Branson*, 98 U. S. 118; *Deffebach v. Hawke*, 115 U. S. 405.) By the entry and payment by Hammack, there being no known mine on the land, the entire interest to the center of the earth vested in him, and there was nothing left in the United States for a subsequent grant to other parties to operate upon. The only exceptions in the patent relate to easements and other prior rights already vested in other parties, before the date of the entry, as was held in the case of *P. C. Milling & M. Co. v. Spargo*, cited. No other exceptions are authorized by the statute to be inserted, and exceptions not so authorized, if inserted, would be void. (*Cowell v. Lammers*, 10 Sawy. 254; 21 Fed. Rep. 200; *Deffebach v. Hawke*, 115 U. S. 402, 406.) Section 2322, Revised Statutes, relied on by defendant, does not authorize any such exception, and it only applies, at most, to public lands, and to rights acquired to such lands before other parties acquire interests therein. It, certainly, does not apply to agricultural lands disposed of years—perhaps half a century before—by the government and before any easement, or other right, has become vested in other parties. The United States can undoubtedly grant easements, and other limited rights, in any portion of the public lands, and subsequent purchasers must take them burdened with such easements or other rights; but when it has once disposed of its entire estate

in the lands to one party, it can, afterwards, no more burden it with other rights than any other proprietor of lands. (*Mining Debris Case*, 9 Sawy. 493; 18 Fed. Rep. 753.) The defendant acquired no rights in the premises in question under the section cited, or any other statute of the United States, brought to the notice of the court, as against the prior grant under which the plaintiff holds. The result is that there must be a judgment for plaintiff, and it is so ordered.

L. GOLDSMITH ET AL. v. M. B. HOLMES ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 5, 1888.

1. RELATION OF PARTIES TO NEGOTIABLE INSTRUMENTS. — The true relation of parties to a negotiable instrument may, as between themselves, be proven by parol, whenever it is necessary to a correct determination of the right or liability of either of them thereon, and this may be done to enable a party to such an instrument to maintain an action thereon in the United States circuit court.
2. CASE IN JUDGMENT. — W. F. Owens, wishing to borrow ten thousand dollars of the plaintiffs, offered to give a note therefor with the defendants as security, and the plaintiffs consenting, he delivered them a note for the amount, signed by the defendants and payable to his order, which he at the same time indorsed, and also subscribed a waiver of notice and protest written thereon, and received the amount to his own use; the note not being paid when due, the plaintiffs brought this action against the defendants, to recover the amount thereof; the defendants demur to the complaint for want of jurisdiction in the court. *Held*, that the plaintiffs are the payees and not the assignees of the note, and that there never was any assignment thereof, within the restriction on the jurisdiction of this court, over an action to recover the contents of a promissory note, contained in the last clause of section 1 of the judiciary act of 1887 (23 Stats. 553).

Before DEADY, District Judge.

Mr. Lewis B. Cox, for the plaintiffs.

Mr. Parish L. Willis, for the defendants.

DEADY, J. This action is brought by the plaintiffs, citizens of New York, against the defendants, citizens of Oregon, to recover the contents of a promissory note made by the latter for ten thousand dollars.

It is alleged in the complaint that on or about August 1, 1886, W. F. Owens applied to the plaintiffs for a loan of ten

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thousand dollars, and offered to give therefor a promissory note, with such additional parties thereto as should be approved by the plaintiffs, to which application, on the condition stated, the plaintiffs acceded; that thereupon, on August 9, 1886, Owens procured the defendants to "execute" and deliver to him a promissory note for that sum, payable with interest in six months, to his order, and signed by them as makers; that thereafter Owens indorsed said note by writing his name in blank thereon, and at the same time subscribed his name to the following indorsement thereon: "For value received, I hereby waive on the within demand, notice, and protest," and delivered the same to the plaintiffs as security for the payment of the proposed loan, whereupon the plaintiffs accepted said note and advanced thereon, to Owens, the sum of ten thousand dollars; that the defendants "executed" said note for the accommodation of Owens, to enable him to procure said loan thereon and not otherwise, and the latter was in fact the maker of said note to the plaintiffs, and never had any cause of action thereon against the defendants, and that said note is wholly unpaid.

The defendants demur to the complaint, for that: (1) The court has no jurisdiction of the subject of the action, nor the persons of the defendants therein; and (2) the facts stated do not constitute a cause of action.

On the argument of the demurrer, counsel for the defendants relied solely on the point that under section 1 of the act of 1887 (24 Stats. 553), this court has no jurisdiction of this action to recover the contents of the note in question, because an action could not have been maintained herein for such purpose, "if no assignment or transfer" thereof had been made to the plaintiffs.

It is admitted that Owens is dead, and that in his lifetime he was a citizen of Oregon; and that the complaint being silent as to his citizenship, he must, for the purposes of this demurrer, be presumed to have been a citizen of Oregon at the time of the delivery of the note to the plaintiffs. (See *Morgan v. Gay*, 19 Wall. 81.)

On the facts stated in the complaint, counsel for the plaintiffs contend that the case is not within the purview of the statute; that Owens was not the assignor of this note, but a joint maker

with the defendants; that the plaintiffs are, in point of fact, the payees of the note and the first holders of the same for value, and that it was first put in circulation when delivered to them, and has never been assigned to any one.

The plain purpose of the statute is to prevent the holder of a promissory note or other chose in action who, by reason of the citizenship of the parties thereto, cannot sue those liable to him thereon in the United States circuit court, from assigning or transferring the same to some one who can do so.

The note had no existence as a legal obligation until it was delivered to the plaintiffs. Prior to that it was but an inchoate instrument, which could only become binding by passing into the hands of a *bona fide* holder for value. (*Brummel v. Enders*, 18 Gratt. 894.)

It was made by the defendants for the accommodation of Owens, and until he wrote his name on it and delivered it to the plaintiffs, no one was liable on it or could maintain an action thereon. It was in fact Owens' own note, with these defendants as his co-makers and sureties, on which he borrowed the money of the plaintiffs, and of which he was to all intents and purposes the maker.

Although an indorser in form, the law regards him as a maker, and therefore the holder of the instrument was not bound to give Owens notice of the non-payment thereof by the defendants, even if he had not expressly waived the same. (2 Daniel on Negotiable Instruments, sec. 1085.)

The true relations between the parties to a negotiable instrument are not conclusively shown by its form; and therefore it may be proved by parol that they are otherwise. (*Brummel v. Enders*, 18 Gratt. 905; *Harris v. Brooks*, 21 Pick. 195; *Smith v. Morrill*, 58 Me. 48; *Susquehanna B. & B. Co. v. Evans*, 4 Wash. C. C. 480; *Hubbard v. Gurney*, 64 N. Y. 457; *Sweet v. McAllister*, 4 Allen, 353; 1 Daniel on Negotiable Instruments, sec. 723; 2 Wharton on Evidence, sec. 1059.)

For instance, it is said in the last case cited that it may be shown "that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of them joint sureties," citing *Clapp v. Rice*, 13 Gray, 403.

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So in this case, if Owens had paid this note when it became due, and then brought an action as payee thereof to recover the amount from the defendants as makers of the same, they might have shown by parol the true relation between themselves and Owens; that he was in fact the principal in and maker of the note and received the money thereon; and that they were only his sureties, and thus defeat the action.

Is there any good reason why the plaintiff may not, for the purpose of maintaining this action in this court, show that notwithstanding the form of the note, they are in fact the payees of the same; that it has never been really assigned to any one, but was put in circulation by delivery to them by Owens, one of the makers thereof, for money then loaned to him? I can conceive of none, nor has any been suggested in the argument.

The jurisdiction of this court is presumably a beneficial one, and therefore the law conferring it is not to be strictly construed, but rather the exception to it. The exercise of this jurisdiction tends to promote confidence and commercial intercourse between the citizens of the several states of the Union, by furnishing them a comparatively impartial tribunal wherein to adjudicate and enforce the controverted and unsatisfied claims growing out of such intercourse.

The facts showing the true relations between the parties to this note, may, as between themselves, be alleged and proven by parol, for any purpose affecting either of their rights or liabilities thereon. The right of the plaintiffs "to recover the contents" of this note from the defendants, by an action in this court, and the liability of the defendants therein, are among these rights and liabilities. Therefore, when it is necessary to maintain the jurisdiction of the court in such an action, to show that the plaintiff, who upon the face of a note, is in form an indorsee or assignee thereof, is in fact the payee of the same, it may be done.

On the facts stated in the complaint, the plaintiffs are the payees and first holders of this note. There never was any assignment of it; and the case does not come within the restriction of the judiciary act, nor the reason of it.

The demurrer is overruled.

Statement of Facts.

[November,

IN RE WY SHING.

IN RE WONG GAN.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

NOVEMBER 8, 1888.

1. CHINESE CHILDREN BORN IN UNITED STATES—CITIZENSHIP—FOURTEENTH AMENDMENT.—A person born in the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the government of China, or other foreign power, is born subject to the jurisdiction of the United States, and he is a citizen thereof, under the fourteenth amendment to the national constitution.*
2. SAME—EXCLUSION ACTS—CONSTRUCTION.—The Chinese restriction acts of 1882 and 1884, and the exclusion act of 1888, are not applicable to citizens of the United States, though of Chinese parentage.*
3. CONSTITUTIONAL LAW—RIGHTS OF CITIZENS.—No citizen can be excluded from the United States, except in punishment for crime.

Before SAWYER, Circuit Judge.

Habeas corpus.

Wy Shing was born in San Francisco, Cal., of Chinese parents, who had intermarried at Marysville, in the state of California. After his birth petitioner's parents returned to Marysville, where his mother died when he was three years old. When petitioner was six years old his father sent him to China in charge of an elder brother of the father, where he remained till thirteen years old, when he returned to California. In 1885 he went to China again, and remained there till September, 1888, when he took passage a second time for California, before the passage of the late exclusion act. He arrived at San Francisco October 7, 1888, after the approval of said exclusion act, on October 1, 1888. The collector refused him permission to land, on the ground that he was a Chinese laborer, who had departed from the country, and that he was prohibited from returning by the provisions of said act. His father was, and he still is, a laborer, and he was in no way in the service of the emperor or government of China at the time of the birth of petitioner, or at any other time. He still resides in California, and he has never been back to China, or left the state of California since the birth of petitioner.

* See, to the same effect, *Ex parte Chin King*, ante, 324; 35 Fed. Rep. 354; *In re Yung Sing Hoe*, ante, 432; 35 Fed. Rep. 437.

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Wong Gan was born in San Francisco in 1868. He is now twenty years old. His father was a merchant while here, but he labors in the field in China, although he has an interest in a small trading establishment. The petitioner returned to China with his parents when he was fourteen years old, where he remained till September, 1888, when he embarked on his return voyage to San Francisco, and arrived at his destination since the passage of the exclusion act. Neither his father nor his mother has ever returned to San Francisco, since their departure in 1881. They still remain in China. While here they had no connection with the diplomatic service of the Chinese empire.

Mr. A. H. Ricketts, for petitioners.

Mr. John T. Carey, United States Attorney, for the United States.

SAWYER, Circuit Judge, after stating the facts as above. In *Look Tin Sing's Case*, 10 Sawy. 353; 21 Fed. Rep. 905, after a full argument by able counsel, and careful consideration by the court, Mr. Justice FIELD, with the concurrence of the circuit and district judges, held that a person born in the United States, of Chinese parents not engaged in the diplomatic service of any foreign government, is born subject to the jurisdiction of the United States, and is a citizen thereof, under the provisions of the fourteenth amendment to the national constitution. As such citizen, it was further held that he was not subject to the Chinese restriction laws, and could not be excluded from this country. I am still satisfied with this ruling; but, if I were in doubt, I should not presume to overrule Mr. Justice FIELD upon a question which he has so maturely considered, and decided. If the point was erroneously decided, then children of Caucasian parentage, born under similar circumstances, are not citizens; and hundreds of thousands have, for years, been, unlawfully, enjoying and exercising all the rights of citizens, civil and political. The decision in that case controls these cases, which are similar to it. The petitioners are citizens, and are not, and they cannot be, excluded from the United States under the provisions of the late act in question. They are, therefore, illegally restrained of their liberty, and must be discharged, and it is so ordered.

THE UNITED STATES v. SIMON LEWIS.

DISTRICT COURT, DISTRICT OF OREGON.

NOVEMBER 10, 1898.

1. SUBDIVISION 1 OF SECTION 563 OF THE REVISED STATUTES.—This statute does not confer jurisdiction on the district courts of any crime not otherwise defined by some statute of the United States.
2. COMMON-LAW CRIMES.—The courts of the United States have no common-law jurisdiction in criminal cases.
3. ASSAULT ON THE HIGH SEAS.—An assault with a dangerous weapon on the high seas is not a crime against the United States, unless committed on board an American vessel, as provided in section 5346 of the Revised Statutes.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for the plaintiff.*Mr. Edward N. Deady*, for the defendant.

DEADY, J. The defendant is accused by the information in this case of the crime of assault with a dangerous weapon on the high seas, contrary to the statute in such cases made and provided, and alleged to have been committed as follows:—

On October 27, 1888, the defendant was the master of the bark *Emblem*, then on the Pacific Ocean about four hundred miles off the coast of Oregon, and did then and there assault and beat one Walter Toy, a seaman on said bark, with a dangerous weapon, to wit, a deck scraper.

The defendant demurs to the information for that the facts stated therein do not “bring the offense charged within the jurisdiction of this court.”

Subdivision 1 of section 563 of the Revised Statutes gives the district courts jurisdiction “of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts or upon the high seas, the punishment of which is not capital, except,” etc.

Section 5346 provides: “Every person who, upon the high seas . . . within the admiralty jurisdiction of the United States . . . on board any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon . . . commits an assault on another, shall be punished,” etc.

Jurisdiction in this case is claimed under subdivision 1 of section 563. But this section does not confer jurisdiction on the district courts of any particular crime, but only of such as may be committed within their respective districts or upon the high seas, and are cognizable under the authority of the United States. A crime is "cognizable under the authority of the United States" when it is triable in its courts by virtue of its laws.

It is long since settled that the courts of the United States have no common-law jurisdiction in criminal cases; that so far as the United States are concerned there are no common-law crimes, and that therefore its courts cannot take cognizance of any act or omission as a crime unless it has been made such by an act of Congress. (*United States v. Hudson*, 7 Cranch, 32; *United States v. Bevans*, 3 Wheat. 336.)

The only act of Congress making an assault on the high seas, with a dangerous weapon, a crime, is section 5346 of the Revised Statutes (sec. 4 of the act of 1825), and one of the elements of the crime, as therein defined, is that the assault must take place on board of a vessel belonging in whole or in part to the United States, or some citizen thereof. The information does not disclose the nationality of the vessel on which the alleged assault took place. To constitute a crime against the United States of which this court has jurisdiction, the assault must have taken place on board an American vessel, and that fact must be alleged in the pleading.

As a matter of fact, it is admitted in this case that the *Emblem* is a British vessel, and that the parties to the assault are British subjects. But this admission is unnecessary, for the American nationality of the vessel must be alleged. That Congress may go further, and authorize the punishment of parties for offenses committed on the high seas, without reference to their nationality, or that of the vessel on which the same are committed, if they shall thereafter be found or come within the United States, may be admitted. (*United States v. Palmer*, 3 Wheat. 630; *United States v. Bevans*, 3 Wheat. 386; *United States v. Kessler*, 1 Bald. 28; *United States v. Wilson*, 3 Blatchf. 438.) But as yet it has not done so.

The celebrated case of *Reg. v. Keyn*, Law R. 2 Ex. Div.

63, is instructive on this subject. It was there held by seven judges to six that the crime of manslaughter, committed even within three miles of the coast of England, by a German subject on the person of a British one, was not within the jurisdiction of the admiralty of England, because Parliament had not made it so. The case was this: Keyn was in command of the German ship *Franconia*, on a voyage from Hamburg to St. Thomas. When within two and a half miles from the beach of Dover, the *Franconia*, by the negligence, as the jury found, of the defendant, ran into the British ship, *Strathclyde*, and sank her, causing the death of one of her passengers. It was agreed that the jurisdiction of the admiralty included all persons in British vessels on the high seas, along the coast, from low-water mark seaward; and by a majority of the judges, that the jurisdiction extends to all persons, whether natural-born subjects or not, on board British ships, everywhere on the high seas, and to no others.

The decision led to the passage of the "territorial waters jurisdiction act" (40 and 41 Vict. ch. 73, 1878), which declares that the jurisdiction of the British crown extends, and always has extended, over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of her majesty's dominions, to such a distance as is necessary for the defense and security thereof, and that any part of the open sea within one marine league of low-water mark shall be deemed open sea within the meaning of the act. (See 2 Stephen's Hist. Crim. Law of England, 29.)

The assault alleged in the information is not a violation of any law of the United States, and therefore the demurrer is sustained, and judgment thereon will be given in bar of the action.

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Opinion of the Court—Deady, J.

W. S. POWELL v. THE OREGONIAN RAILWAY COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 8, 1888.

1. **INDEBTEDNESS OF A CORPORATION FOR WHICH A STOCKHOLDER IS LIABLE.**—A corporation being the lessee of property, permitted waste thereon for which the lessor, in an action for damages, recovered a judgment for five thousand three hundred dollars, and the corporation being insolvent, brought suit against a stockholder thereof, on whose stock more than that amount was then unpaid, to enforce the payment of the judgment. *Held*, that whether the original claim of the plaintiff for damages, was or was not an "indebtedness" of the corporation within the scope of section 3 of article 11 of the constitution of the state, which declares that a stockholder of a corporation "shall be liable for the indebtedness" of the same, to the amount unpaid on his stock, the judgment obtained thereon is such an "indebtedness"; and any stockholder of the corporation is liable therefor, to the plaintiff therein, to the amount unpaid on his stock.
2. **LIABILITY OF STOCKHOLDER.**—A judgment against a corporation for the recovery of money is conclusive evidence in a suit against a stockholder for the collection of said judgment, of the existence of the corporation, and its liability to plaintiff therein, as thereby determined; and such judgment, whether given in an action *ex contractu* or *ex delicto*, is an indebtedness of the corporation for which a stockholder is liable to the amount due on his stock.
3. **STATUTE OF LIMITATIONS.**—In a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute does not commence to run against the judgment creditor, and in favor of the stockholder, until the entry of the judgment.

Before DEADY, District Judge.

Mr. Arthur L. Frazer, for the plaintiff.*Mr. Earl C. Bronaugh*, for the defendant.

DEADY, J. This suit is brought by the plaintiff, a citizen of Oregon, against the defendant, a British corporation having its principal office in Dundee, Scotland, to enforce the payment of a judgment heretofore obtained by him against the Dayton, Sheridan, and Grand Ronde Railway Company, to wit, on April 8, 1887, for the sum of \$5,300.

It is alleged in the bill that the D. S. & G. R. Ry. Co. is a corporation formed under the laws of Oregon, with a capital stock of 2,000 shares, of the par value of \$100 each; that Joseph Gaston, under the name of J. Gaston & Co., subscribed 1,000 shares of such stock, while all the other subscriptions to the same only amounted to 50½ shares, which were paid in full;

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that in 1880 Gaston sold and transferred his stock, without having paid anything thereon, to Ellis G. Hughes, who, on February 27, 1884, sold and transferred the same to the defendant, who now is and ever since has been the owner of the same; that no part of Gaston's subscription was ever paid by any one, except the sum of \$61,000 paid by the defendant, in pursuance of a decree given against it by the supreme court of the state, on January 14, 1884, in the suit of *Branson v. The D. S. & G. R. Ry. Co.*, and that there is still due and unpaid on the same the sum of \$39,000.

That on January 29, 1887, the plaintiff commenced an action in the circuit court of the state for the county of Yamhill, against the D. S. & G. R. Ry. Co., to recover damages for an injury to plaintiff's property, while leased to said company, and obtained a judgment therein for the sum of \$5,300, and at the same time served a notice on the defendant herein, as the successor in interest of the D. S. & G. R. Ry. Co., to defend the said action, and that the plaintiff would look to the defendant for the payment of any judgment he might recover therein; that the defendant by its attorneys did make a defense to said action, and on September 12, 1887, caused an appeal to be taken from the judgment therein to the supreme court, where the same was affirmed with costs, amounting to \$77.20; that since July 1, 1883, the D. S. & G. R. Ry. Co. has been and now is wholly insolvent, and has no property within the state subject to execution; and that the defendant being the owner, as aforesaid, of the stock of said company on which the sum of \$39,000 is due and unpaid, is liable to the plaintiff, as a creditor of the company, for the amount of said judgment against the same.

The prayer of the bill is that the defendant be compelled to pay into court on the unpaid stock of the D. S. & G. R. Ry. Co. a sum sufficient to satisfy its indebtedness to the plaintiff, or that the latter have a decree against the defendant for the amount of the judgment against the company, with interest.

The defendant demurs to the bill, for that the plaintiff, on the case stated in the bill, is not entitled to any relief against it.

On the argument the only point made in support of the demurrer was, that the claim of the plaintiff having arisen out

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of a tort is not such an "indebtedness" as a stockholder is liable for.

The constitution of Oregon (Art. 11, sec. 2) provides that "corporations may be formed under general laws;" and (Art. 11, sec. 3) enacts: "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

Section 14 of the corporation act (Comp. 1887, sec. 3230) provides: "All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

At common law, the members or stockholders of a corporation are not individually liable for the debts of the same. (Thompson's Liability of Stockholders, secs. 1, 4; *Pollard v. Bailey*, 20 Wall. 526.) But the capital stock of a corporation is considered a trust fund for the payment of its debts (Thomp. L. of S. sec. 10); and an unpaid subscription to the stock of a corporation is a part of such capital stock. (Thomp. L. of S. sec. 11.)

From this it appears that the rule prescribed in the constitution of the state, concerning the liability of stockholders, is neither more nor less than that of the common law. Under either, the stockholder is liable for the indebtedness of the corporation to the extent of his unpaid subscription or stock, "and no more."

Several cases have been cited on the argument of counsel for the respective parties, but none of them are altogether in point.

In *Mill Dam Foundry v. Hovey*, 21 Pick. 417, the statute made the stockholder liable for the existing debts of the corporation, if the latter failed to publish annually the amount paid in of its capital stock and existing debts, and the question in the case was, whether a claim for unliquidated damages arising out of a breach of a contract to manufacture certain articles was a

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"debt" within the statute. And although the statute was in effect a penal one, the court held that "all such claims for damages were intended to be included in the term 'debts.'" (21 Pick. 454, 455.)

In *Carver v. Braintree Manuf. Co.* 2 Story, 432, a statute that made a member of any manufacturing corporation individually liable for all "debts contracted" during his membership was held to be remedial in its character, and the phrase "debt contracted," as used therein, to include a claim for unliquidated damages growing out of a tort—the infringement of a patent.

But in both these cases the question only arose incidentally on the exclusion on account of interest of a witness, and in the former one it appears to have been decided without any consideration.

In *Haynes v. Brown*, 36 N. H. 545, under a statute which made the stockholders in a corporation liable for "all debts and contracts" thereof, while it omitted to file for record a certificate of the amount of its capital stock, "it was held that the right to recover against the stockholder was not limited to liquidated claims, but included an open account for work and labor."

In *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 282, it was held that under a statute giving an action in favor of a "creditor" against the heirs and devisees of a "debtor," the former might maintain an action against the heir for unliquidated damages arising out of a breach of covenant.

A statute of Missouri provides that every corporation shall give notice annually in a newspaper "of all the existing debts of the corporation," and a failure to do so makes each stockholder liable for all the *debts* of the company then existing, and for all that shall be *contracted* before such notice shall be given.

In *Cable v. McCune*, 26 Mo. 371, it was held in a suit brought under the statute, against a stockholder, to enforce the payment of a judgment obtained against the corporation for damages caused by its negligence in docking a steamboat, that the stockholder was not liable. The ground of the decision is that the statute is penal, and therefore the word "debt" ought to be taken in "that limited and definite sense to which long established usage is restricted it;" and that the use of the word "con-

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tracted," with reference to the "debt" which a stockholder may become liable to pay, indicates clearly that it was the intention of the legislature to limit such liability to debts arising out of contract and not a wrong.

A statute of New York made each stockholder of the Buffalo Hydraulic Association holden, to the amount of his stock, "for the payment of *debts* contracted by the corporation;" and any person having any *demand* against said corporation "might sue any stockholder and recover the same; provided no stockholder should be obliged to pay more in the whole than the amount of his stock at the time the debt accrued."

In *Heacock v. Sherman*, 14 Wend. 58, it was held in an action against a stockholder of this corporation, that the term "debt," as used in this act, was limited to claims arising out of contract, and did not include one for damages arising out of the wrong of the corporation. It was admitted that the word "demand," standing by itself, was comprehensive enough to include the claim. But it was said that the liability of the stockholder was first fixed and limited to the "debts" of the corporation, and the word "demand" was not used for the purpose of enlarging this liability, but in a clause only intended to further the remedy; and that the subsequent phrase, "the debt accrued," used in limiting the amount of the stockholder's liability, clearly qualifies the enlarged sense of the word "demand," and shows that it was used by the legislature "to denote a demand arising on contract."

A statute of Michigan provides that every stockholder of a corporation shall be individually liable for all labor performed for the corporation, and for all debts of the same, to an amount equal to his stock when "such debt was *contracted* and suit commenced thereon."

In *Bohn v. Brown*, 27 Mich. 503, it was held in a suit brought under this act against a stockholder in a railway corporation, to enforce the payment of a judgment obtained against said corporation for damages, caused by its negligence in carrying a passenger, that the stockholder was not liable, for the reason that such damages are not a "debt" within the meaning of the statute, and that the putting the claim for them into a judgment against the corporation did not change their character in this respect.

The statute (Comp. 1887, sec. 3230) does not undertake to declare or define what debts or claims a stockholder in an Oregon corporation shall be liable for; nor does it appear that the legislature, under the constitution, has the power to do so.

It is admitted by the demurrer that the defendant has been a stockholder in the corporation, against whom the judgment in question was given, since February 27, 1884. Its liability as such stockholder must then depend on the proper construction of the term "indebtedness," as used in the section of the constitution above quoted.

The provision in the constitution on the liability of stockholders is neither remedial nor penal. It gives no new right to the creditor, nor does it impose any extraordinary liability or penalty on the stockholder. It is therefore not to be construed liberally or loosely with a view of making the remedy adequate to the redress of some pre-existing hardship or wrong, nor strictly, because of its penal character.

According to Worcester "indebtedness" means, "The state of being indebted." The indebtedness of a corporation is then the sum of its debts. And so it will be convenient to consider the constitutional provision as if it read, "shall be liable for the debts of said corporation."

"The legal acceptance of *debt* is a sum of money due by certain and express agreement: as by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specified, and does not depend on any subsequent valuation to settle it." (3 Blackst. 154.) And where the agreement to pay is implied by law, the sum to be paid is also a debt. Blackstone (3 book, 158) says: "Every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law. . . . Whatever, therefore, the laws order any one to pay, that becomes instantly *debt*, which he hath beforehand contracted to discharge." This includes a judgment for a particular sum of money.

In *Gray v. Bennett*, 3 Met. 526, it is said that "the word 'debt' is of large import, including not only debts of record or judgments and debts by specialty, but also obligations arising

under simple contract, to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise."

In *Crouch v. Gridley*, 6 Hill, 250, it was held that a discharge in bankruptcy from all the "debts" owed by the bankrupt at the filing of his petition, did not discharge him from a claim for damages for a tort which was in suit at the filing of the petition, but had not then ripened into judgment.

In *Kellogg v. Schuyler*, 2 Denio, 73, it was held that a claim for damages for a trespass was not a "debt" within the bankrupt act, and therefore was not affected by the bankrupt's discharge, although the claim was in suit at the time, and a verdict had been found for the plaintiff. In disposing of the case, the court, in speaking of the claim, said: "Until judgment is rendered, there is no debt which is reached by the discharge."

In *Zimmer v. Schlehauf*, 115 Mass. 52, it was held that a claim for damages for slander and malicious prosecution was not a "debt" or "liability contracted" by the bankrupt, and was therefore not affected by a discharge of the bankrupt under the act of 1867. The claim for damages was in suit when the proceeding in bankruptcy was commenced, and there had been a verdict for the plaintiff on which a judgment was given thereafter, but before the discharge. In delivering the opinion of the court Chief Justice Gray said: "A claim for damages in an action of tort does not become a debt by verdict before judgment." See, also, as to what is a debt, Burrill's Law Dict.; Rap. & Law. Law Dict.; Wharton's Law Lex.

The nature of the plaintiff's property, and the damage to it, for which the judgment was obtained, is not stated in the bill. But it was understood on the argument that the property was a warehouse at Dayton, on the Yamhill River, which the lessee negligently permitted to be washed away during a season of high water. In other words, the claim was unliquidated damages, alleged to have been caused by a permissive waste.

Such a claim is not a "debt" in any ordinary sense of the word. Nor do I see any good reason why the term "indebtedness," as used in the constitution, with reference to corporations, should be construed to include such a claim. But it is not

necessary now to decide that question, and it may be left to the determination of the supreme court of the state, whose office it is to expound the constitution thereof.

When this claim for unliquidated damages became, by the action of the parties under the direction and the limitation of the law, a judgment against the corporation for a definite sum of money, it became, in my opinion, an "indebtedness" of such corporation; and any person then or since, being a stockholder thereof, at once became liable to the plaintiff for such debt, to the amount unpaid on his stock.

A claim for unliquidated damages may become a "debt" against a corporation otherwise than by judgment. For instance, the corporation may have compromised with the plaintiff and given him its note for a portion of this claim in satisfaction thereof, or being satisfied of the justice of the claim or the impolicy of contesting it, may have given its note for a full amount thereof. In this way the claim would become a "debt" of the corporation, within the strictest definition of the term, and the liability of the stockholder would commence.

The effect of allowing the plaintiff to take a judgment on this claim, or of his obtaining one, notwithstanding a defense thereto, by the corporation, is the same in this respect as a voluntary liquidation thereof. What was once a mere claim for an undetermined amount becomes, in either case, a "debt"—a legal obligation to pay a definite sum of money.

Assuming that there is neither fraud nor collusion in the premises, whatever indebtedness a corporation may lawfully contract or incur, the stockholder, to the amount of his stock, is bound to pay. Such is the obligation which the law, under these circumstances, raises in favor of the creditor of the corporation and against a stockholder thereof.

On the facts stated in the bill, the plaintiff is entitled to the relief sought. The demurrer is overruled.

In arriving at this conclusion no consideration has been given to the allegations in the bill, concerning the notice to the defendant of the action against the D. S. & G. R. Ry. Co., and the defense made to the same by its attorneys.

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Opinion of the Court—Deady, J.

MARCH 18, 1889.

DEADY, J. This suit is brought to collect from the defendant a judgment obtained by the plaintiff on April 8, 1887, against the Dayton, Sheridan, and Grand Ronde Railway Company, for the sum of \$5,300.

The defendant is sued as the holder of 1,000 shares of stock of said corporation, since February 27, 1884, on which there is due and unpaid the sum of \$39,000. And it is alleged in the bill that these are the only shares of the stock on which anything is due.

The case was before this court on December 8, 1888 (36 Fed. Rep. 726), on a demurrer to the bill, when it was held that a judgment obtained against an Oregon corporation for permissive waste constituted an "indebtedness" of such corporation, within the purview of article 11, section 2, of the constitution of the state, for which a stockholder therein is liable thereunder to the amount of his unpaid stock.

In *Ladd v. Cartwright*, 7 Or. 329, it was held by the supreme court of the state, that a creditor of a corporation cannot proceed against a stockholder to subject any unpaid balance on the latter's stock to the payment of his claim, in the first instance. But he must exhaust his remedy at law against the corporation, when he may proceed in equity against all the delinquent stockholders, where the rights of all parties may be adjusted in one suit. (See, also, *Patterson v. Lynde*, 106 U. S. 519; *Pollard v. Bailey*, 20 Wall. 520.)

On the overruling of the demurrer, the defendant had leave to answer the bill. The answer is excepted to for impertinence. The exceptions include the greater part of the pleading.

In and by the matter excepted to the defendant alleges in effect: (1) That the D. S. & G. R. Ry. Co. was dissolved and not in existence on January 29, 1887, when the action was commenced, in which the judgment sought to be enforced was obtained, and therefore the latter is void; (2) that the cause of such action was a claim for damages sounding in tort, and not an "indebtedness," for which a stockholder may be liable to a creditor of the corporation; and (3) that the cause of suit is barred by the lapse of time.

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In support of the averment that the judgment is void, it is alleged in the answer that on January 8, 1879, the D. S. & G. R. Ry. Co. being insolvent, the Wallamet Valley Railway Company proposed to purchase its road and property, and that the stockholders of the former corporation at a meeting thereof, held on February 15, 1879, accepted such proposition, and authorized the directors thereof to dispose of the property accordingly, which they did on June 2, 1879; and said stockholders, at said meeting, also passed a resolution to the effect that upon the transfer of its road and property being made to the W. V. Ry. Co., as aforesaid, "this company do stand dissolved."

In the action in which this judgment was obtained, the defense was made that the D. S. & G. R. Ry. Co. was dissolved and non-existent. But it appears that the trial court ruled otherwise, and on an appeal to the supreme court the ruling was affirmed. (*Powell v. D. S. & G. R. Ry. Co.* 16 Or. 33.) I am unable to see why this is not an adjudication of the question, and one that is binding on this defendant. The general rule on this subject is that a stockholder is in privity with the corporation, and cannot collaterally question a judgment against it, except for fraud or want of jurisdiction. (Thompson's *Liability of Stockholders*, sec. 329.) And although it may be that a valid judgment cannot be given against a dissolved or dead corporation any more than against a dead man, yet where the existence of the corporation is put in issue and contested and determined in favor of such existence, certainly the stockholder is bound by the result. It may be that where a judgment is obtained by default against an alleged corporation, which is in fact defunct, and the same is sought to be enforced against a stockholder, he may contest the existence of the corporation as a defense to the suit.

It seems, that this question has been decided otherwise, and I may say, *everywise*, in New York; but in *Stephens v. Fox*, 83 N. Y. 313, the court of appeals appears to have wheeled into line with the current of judicial decisions, and holds that in a proceeding by a creditor of the corporation against a stockholder thereof, a judgment against the corporation is competent evidence of the plaintiff's status as a creditor thereof and the amount of his

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claim. In other words, the judgment not only concludes the corporation on the question of indebtedness to the creditor therein, but also establishes the title of the creditor to succeed to the right of the corporation, namely, to have the balance due on the stock applied on his demand.

But as a matter of fact, the D. S. & G. R. Ry. Co. does not appear ever to have been dissolved. True, the stockholders declared that it should "stand dissolved" on a given contingency, which actually happened; namely, the transfer of its road to the W. V. Ry. Co. But the power of stockholders is limited by the corporation act, to the mere authorizing a dissolution; and in and of themselves, they have no such power. Section 3225 (Comp. 1887) declares that from the first meeting of the directors of a corporation the powers vested therein are exercised by them, except as otherwise specially provided. Section 3235 (Comp. 1887) provides that the stockholders may, by a majority vote of the stock, "authorize the dissolution" of the corporation. But they are not empowered to declare or otherwise accomplish such dissolution. The power of dissolution, when so authorized, like all other powers of the corporation, not otherwise especially vested, belongs to the directors, by whom it must be exercised, if at all. In this case the stockholders appear to have ignored the directors, and instead of authorizing them to dissolve the corporation, undertook to do it themselves. This act was a nullity; and the dissolution of the corporation, so far as appears, has not yet been even duly authorized, let alone accomplished.

In *Wallamet Falls Co. v. Kittridge*, 5 Sawy. 48, it was held by this court, that a dissolution of a corporation must be authorized by the stockholders, and declared by the directors, who may do so or not, as they see proper.

It is admitted that this judgment was given in an action for damages sustained by the plaintiff on account of a certain waste suffered or permitted by the D. S. & G. R. Ry. Co., while it was the lessee of a warehouse belonging to the plaintiff, and situate at Dayton on the line of its road. But what effect that fact has on the liability of the defendant to contribute what is due on its stock to the satisfaction of this judgment, as an "indebtedness" of the corporation, is not apparent.

The capital stock of a corporation is a trust fund, for the payment or discharge of any liability which in the course of its business it may incur, either *ex contractu* or *ex delicto*. For instance, the D. S. & G. R. Ry. Co. might, on the happening of this waste, have made a call on its stockholders for the means to discharge such liability, and they would have been bound to respond to the extent of the amount due on their stock, if necessary.

The constitution of the state (Art. 11, sec. 3), declares that the stockholders of a corporation "shall be liable for the indebtedness" thereof, "to the amount of their stock subscribed and unpaid, and no more." And section 14 of the corporation act (Comp. 1887, sec. 3230), provides, that the purchase of the stock of a corporation, "subjects the purchaser to the payment of any unpaid balance, due or to become due on such stock."

Under these circumstances, the judgment obtained by the plaintiff against the defendant corporation, is, as was said in *Stephens v. Fox, supra*, 317, "as effectual to pass its title to the fund in question"—the balance due on the defendant's stock—"as a deed or any other form of transfer." In effect, the plaintiff is thereby subrogated to the right of the corporation, to demand and have of and from the defendant, as the holder of its unpaid stock, the balance due thereon, or sufficient thereof, to satisfy his demand.

Indeed, my present opinion is, that the undertaking of a subscriber to or holder of the stock of an Oregon corporation is, to pay the amount due on such stock when called for by the corporation, in the course of its business, including the discharge of its liabilities of whatever nature or kind and however arising, or in default of such call, to contribute or pay the same on such liabilities in the suit of the person in whose favor they exist, after the same have been definitely established by a judgment, in an action at law, against the corporation.

And, therefore, on further investigation and reflection, I wish to qualify a remark in the opinion announced on the demurrer to the bill, to the effect that a claim against a corporation for damages, sounding in tort, is not an "indebtedness" of the same, within the meaning of the term as used in the constitution, but

becomes so, when merged in a judgment against the corporation, by adding that neither is a claim arising out of contract such as an "indebtedness," until definitely established by a judgment against a corporation, and so claims arising either *ex contractu* or *ex delicto* are, in this respect, on the same footing. They are, from their inception, equally liabilities of the corporation, which, when definitely established by judgments against the same, are an "indebtedness" thereof, for the payment of which the unpaid stock of every stockholder is a trust fund.

And lastly, "is this suit barred by lapse of time?"

The contention of counsel for defendant is that it is brought on the original claim for waste, and that is barred by the statute of the state in six years from the time the right of action thereon accrued (Comp. 1887, sec. 6), and that more than seven years had elapsed before the commencement of this suit—July 10, 1888—and the loss of the warehouse—January 15, 1881.

But, in my judgment, this contention is based on a total misapprehension of the nature of these proceedings. The claim for damages for the waste was made against the corporation and not the stockholder, and is merged in the judgment obtained against the former, and no longer exists. This is a different suit between different parties. It is a suit against the stockholder to enforce the payment of said judgment. The liability of the stockholder is secondary—in the nature of a guaranty—and did not arise until judgment was given against the corporation, and it was insolvent.

A suit on this judgment, for any purpose for which it may be maintained or serve as inducement, is not barred for ten years after its entry. This suit is in the nature of a creditor's bill, to collect a judgment from the debtors of the judgment debtor.

No call appears to have been made on the defendant's stock by the corporation. There is therefore no pretense that the statute ever was put in motion against the creditor in that way, even if it could be, which is not conceded. (Thompson's Liability of Stockholders, sec. 291.)

In my judgment, the statute did not commence to run against the liability of the shareholder to the creditor until the latter had exhausted his remedy against the corporation, which in this

Points decided.

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case, the same being insolvent, happened when the judgment was obtained against it. (Thompson's Liability of Stockholders, sec. 293.) Then, and not before, a cause of suit accrued to the plaintiff against the defendant to compel the payment of any balance due on its stock, sufficient to satisfy his judgment. At the same time the statute commenced to run against such cause of suit, and would bar a suit thereon in six years. This is a case in which equity follows the law on that subject. (*Manning v. Hayden*, 5 Sawy. 379.)

The action at law against the corporation was commenced in less than four years after the right accrued, according to the decision of the supreme court in the case (16 Or. 33), and this suit was commenced in fifteen months after judgment was given therein, and in less than six months after it was affirmed on appeal. The claim cannot be considered stale.

In conclusion, a suit on this judgment is not barred for ten years after its entry. (Comp. 1887, sec. 5.) But the liability which the plaintiff hereby seeks to enforce against the defendant arose in favor of the former and against the latter, on April 8, 1887, the date of the judgment against the corporation, and the right of suit thereon is not barred until six years thereafter. "An action upon a contract or liability, express or implied, except those mentioned in section 5" (a judicial record or a sealed instrument), must be commenced "within six years," "after the cause of action shall have accrued." (Comp. 1887, secs. 3, 6.)

The exceptions are allowed.

UNITED STATES v. WHALEY ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

DECEMBER 15, 1888.

1. INDIANS — HOMICIDE — STATUTES — NOTICE. — Act of Congress, March 3, 1885, provides that "immediately upon and after the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter," etc., shall be subject to the same laws, and tried in the same courts, as are all other persons. *Held*, on indictment of Indians for the killing of another Indian, in obedience to tribal resolutions, that it was no defense that defendants never had notice of the statute.

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Opinion of the Court — Ross, J.

Before Ross, District Judge.

Indictment of Bill Whaley, Pancho Francisco, Salt Lake Pete, and Juan Chino (Indians), for murder.

Mr. George J. Denis, for the United States.

Mr. George W. Knox, for defendants.

Ross, J. The defendants, who are Indians, are charged by the indictment in this case with the murder of one Juan Baptista, also Indian, committed on the Tule River Indian reservation, within the state of California, all of the parties at the time sustaining the usual tribal relations. When the case was called for trial the district attorney stated that the proof would be such that a verdict of guilty of murder could not be procured, nor could he contend for it, and therefore consented that the defendants be permitted to withdraw their plea of not guilty, and enter one of guilty of manslaughter, which they desired to do. That was accordingly done. To enable the court to give proper judgment, the counsel for the respective parties then agreed upon most of the facts of the case; and as to one or two points, upon which they were not entirely agreed, witnesses were, by their joint request, heard. These proceedings developed this state of facts: The defendants were members of an Indian tribe, domiciled upon the reservation named, and the deceased was an Indian doctor, who, in the course of his treatment of the members of the tribe, had been so unsuccessful as to induce the belief on the part of its members that he had been systematically poisoning his patients. About twenty of their number had been treated by him, and under his treatment each of them had died. Finally one Indian, Hunter Jim by name, who was a favorite with the tribe, became, under the doctor's treatment, very sick. The members of the tribe held a council, and informed the doctor that if Hunter Jim died they would kill him. Jim did die. A council was held, at which it was determined to kill the doctor, and the four defendants were appointed to carry into effect that determination, which they did, upon the reservation, the following morning, by shooting him.

Had this homicide been committed prior to the passage of the act of Congress of March 3, 1885, this court would have had no jurisdiction of the offense, for the government of the United States had theretofore permitted the Indians preserving their tribal relations to regulate and govern their own internal and social relations. But by the act of 1885 Congress made a radical change in that policy, and therein enacted:—

“That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts, and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.” (23 Stats. ch. 341, p. 362, sec. 9, p. 385.)

The case of these defendants falls within the last class of cases provided for by this law. The counsel for defendants contend with much earnestness that the law in question should not be held to apply to them, for the reason, as it is claimed, that they had no notice of it. If that view should be adopted by the court, the plea of guilty of manslaughter, entered by the defendants, could not be permitted to stand, for of course the court would not enter judgment in a case of which it had no jurisdiction. The validity of the act in both of its branches was determined by the supreme court in the case entitled *United States v. Kagama*, 118 U. S. 375. Its terms are plain, and clearly

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Points decided.

embrace the offense for which defendants were indicted. Congress did not see proper to provide that the law should not take effect until the Indians should be notified of its provisions, but, on the contrary, enacted that immediately upon and after the date of the passage of the act all Indians committing any of the offenses described, within the designated places, shall be subject to the laws therein prescribed. Clearly the court cannot hold the law inapplicable to any Indian who comes within its provisions. While the offense committed by the defendants would, if committed by a white man, have of course been murder, it may be, in view of the Indian nature, their customs, superstition, and ignorance, that in the circumstances attending the killing of the doctor, there was wanting the malice that is essential to constitute the crime of murder. It was that view that prompted the district attorney to say that he could not contend for a verdict of guilty of murder, and to consent to the withdrawal of the plea of not guilty, and to the entry of a plea of guilty of manslaughter. And since justice should be tempered with mercy, perhaps the court may be justified in imposing sentence, in being moved by the same considerations, and in inflicting a punishment which, under ordinary circumstances, would be considered far too light for so atrocious a crime. The judgment of the court is that the defendants, Bill Whaley, Pancho Francisco, Salt Lake Pete, and Juan Chino, and each of them, be imprisoned in the state prison at San Quentin for the period of five years from this date, and pay a fine of one dollar.

BORLAND v. HAVEN ET AL.**CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.****DECEMBER 17, 1888.**

1. **CORPORATIONS—STOCKHOLDERS—STATUTORY LIABILITY—CONSTITUTIONAL LAW.**—Section 322 of the Civil Code of California, fixing the liability of stockholders of corporations adopted in 1876, is not in conflict with article 12, section 3, of the constitution of California of 1879, and was by it expressly continued in force.
2. **SAME—COURTS—NATIONAL JURISDICTION.**—New remedies afforded by state statutes will be applied, and new rights given, enforced, in the national courts. *Held*, accordingly, that an action at law, to enforce the individual liability of stockholders, under provisions of the Civil Code of California, may be maintained in the circuit court of the United States.

Points decided.

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3. **SAME—ENFORCEMENT OF LIABILITY—EVIDENCE.**—In suits to enforce the statutory liabilities of a stockholder for his proportionate share of a debt of the corporation, under the Civil Code of California, testimony that, in a suit against the corporation to recover such debt would be competent to establish the demand against the corporation, is competent to establish the same against the stockholder.
4. **SAME—EXTENT OF LIABILITY—ASSIGNMENT OF STOCK.**—Under the Civil Code of California, the liability of an owner of stock of a corporation continues until a transfer of the shares once held by him has been entered upon the records of the corporation, and this whether the stock stood on the books of the corporation in the name of such owner, or in the name of some other person, as trustee, without disclosing the name of the true owner.
5. **SAME—DIRECTOR AS CREDITOR.**—A stockholder, and even a director, may become a creditor of a corporation where the action is not tainted with fraud or other improper act.
6. **SAME—BANKS AND BANKING—LOANS TO DIRECTORS.**—Where a bank advances money to a corporation upon a director's becoming security, and the form of the security is a promissory note of the corporation made payable to the order of one of its directors, and indorsed by him to the bank, the transaction is between the corporation and the bank, and not between the corporation and the nominal payee of the note. In such case, when the note goes to protest, and is afterwards paid by the director, who is the nominal payee and the indorser, a liability accrues against the corporation for the amount paid in favor of the party so paying.
7. **SAME—RE-INSTATING RESCINDED CONTRACT.**—Where two corporations make a valid agreement, whereby an indebtedness of one corporation is extinguished or assumed by the other, it is competent for said corporations, by mutual agreement duly made, to rescind such agreement, re-instate the liability of the corporation so discharged, and place the parties *in statu quo*; and the stockholders of the debtor corporation in such case will become personally liable for their respective proportionate shares of the liabilities so created or re-instated.
8. **SAME—DIRECTORS.**—Where the directors of a corporation, acting in good faith, upon the reports and representations of the duly authorized agents of the corporation, believing them to be correct, borrow money for the purposes of the corporation, it is not necessary to show that the money so borrowed was all actually appropriated to the legitimate uses of the corporation, in order to establish an indebtedness against it, or a personal liability of its stockholders in favor of the lender of the money, or of the sureties who pay the loan.
9. **LIMITATION OF ACTIONS—PLEADING AND PROOF.**—The plea of the statute of limitations impliedly admits the existence of the demand, and the burden of proving a bar by the statute is on the party pleading it, as in the case of a plea of payment. *Held*, accordingly, that where a portion of a demand is claimed to have been barred, the party so claiming must prove the specific amount; mere proof that some portion is barred, not showing the amount, is not sufficient to establish that the bar of the statute applies to any. In the case of a running account, embracing only one entire transaction or liability, the bar only attaches from the date of the last item.
10. **PLEADING—TRIAL.**—Where a demurrer to a complaint is by the court overruled, its sufficiency will not ordinarily be reconsidered at the trial.

Before SAWYER, Circuit Judge.

At law.

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Statement of Facts.

This is a suit brought by plaintiff against defendants, to recover the shares, for which the defendants are respectively alleged to be personally liable, as stockholders of the Wyoming and Dakota Water Company, for moneys advanced by plaintiff to, and for the benefit of, said corporation. The answer admits that the defendant, Nichols, separately but not jointly with Haven, held 2,500 shares of the stock of said company on May 27, 1879, and from that time till the ——— day of June, 1880, without specifying the day in June, and that defendant Haven, in severalty and not jointly with Nichols, owned 2,500 shares of said stock from May 27, 1879, up to November, 1880. From the evidence, the following additional facts are found:—

The Wyoming and Dakota Water Company is a corporation, organized and existing under the laws of the state of California, having its office and principal place of transacting business at San Francisco, in said state, but its field of operations in constructing, purchasing, owning, and maintaining water ditches for supplying towns and cities with pure water and for mining and for other purposes, is in the territories of Wyoming and Dakota. Its capital stock is \$5,000,000, divided into 100,000 shares of \$50 each. Of these, on May 27, 1879, 5,000 shares were issued and stood upon the books of the corporation in the name of the defendant Haven trustee, but defendant Nichols owned 2,500 of these shares, and defendant Haven 2,500, each in severalty. Afterwards, on April 6, 1880, this certificate was surrendered and canceled on the books, and the stock re-issued in two certificates of 2,500 shares each, in the name of said defendant Haven, trustee, but the shares, so issued, were owned respectively by said defendants, Haven and Nichols, in severalty, each owning 2,500. The said shares were never afterwards transferred on the books of said corporation; but, at the time of the commencement of this suit, the said stock represented by said two certificates of 2,500 shares each, still stood in the name of said Haven, trustee, upon the books of said corporation. In the month of November, 1881, Haven delivered the certificate for 2,500 shares held by himself to one Roberts, with directions to have 100 shares transferred on the books to one Clay, for the purpose of making said Clay, who was an expert in matters of

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book-keeping, a stockholder, and giving him a right as such to examine the books and affairs of said company. Roberts, for his services in the matter, was to have an interest, but no definite amount was specified. Said Roberts presented said certificate to the secretary of said corporation to thus divide said certificate, and the secretary having been recently appointed, and not being familiar with his duties, made an entry in the books with the view of transferring 100 shares to Clay, and leaving the other 2,400 shares still on the books in the name of said Haven, and of issuing two certificates in accordance therewith; but there was an unpaid assessment of one dollar per share upon the stock, and under the statute and by-laws of the corporation, no transfer could be made on the books of the company while there was an unpaid assessment upon it; and the president called the secretary's attention to the assessment and by-laws, and on that ground declined to sign the transfer or issue the new certificates to Clay and Haven. The incomplete attempted entry and transfer on the books was thereupon canceled, and the certificate for 2,500 shares returned to the party presenting it for division and transfer as aforesaid, thus leaving the stock standing in the name of Haven upon the books, as when first issued. What became of the certificate afterwards is not shown by the evidence. There never was any other transfer on the books of the company, and no other was ever attempted or demanded. Nichols, some time in 1880, delivered his certificate for 2,500 shares to a Mr. Honore in New York with certificates of stock in three other companies, the whole to be sold for \$20 per four shares; that is to say, \$20 for four shares, embracing one in each company. That is the last known of those shares, so far as the evidence shows. They were never transferred on the books of the corporation, or presented for transfer; and the fact of the delivery to Honore, as stated, and sale, if sale there was, was not brought in any way to the knowledge of the corporation.

The plaintiff was a large stockholder, originally having 20,000 shares of the stock, and a director in the corporation from its organization until August 12, 1880, and on August 12, 1880, he was president of the board of directors. On said August 12, 1880, he resigned his position, both as president and director,

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and Jules P. Cavallier was elected director in his place, and Thomas Barr as president of the board. Plaintiff was never afterwards a director or officer of said corporation. On said August 12, 1880, several directors resigned and other were elected in their place. Those elected were elected in plaintiff Borland's interest and through his influence, he having furnished them with the stock necessary to qualify them to be directors. Prior to the creation of the second and subsequent indebtedness hereinafter set out, to wit, on June 30, 1880, 15,552 shares of the stock of said corporation were duly sold for unpaid assessments, and purchased in at said sale by the corporation, so that there thereafter remained of the stock of said corporation outstanding in the hands of the shareholders, but 84,448 shares upon which to distribute the liability for any indebtedness thereafter accruing. The said corporation had no funds for carrying on its operations other than money raised from assessments on its capital stock. On June 10, 1880, the duly authorized superintendent of the Wyoming and Dakota Water Company, at Golden Gate, Dakota territory, drew a draft at three days' sight on the president of said corporation at San Francisco, in favor of the Merchants' National Bank at Deadwood, for \$25,000, being for alleged indebtedness incurred in the business of the corporation in the construction of its works, and for the other purposes of the corporation, etc., in Dakota territory, which draft was sent by the payee to the Bank of California at San Francisco, for collection, and was duly presented to the drawee for acceptance, and accepted on June 18th, and payable on June 21, 1880. A draft similar in all respects was drawn by said superintendent at the same place, payable at the same time in favor of the First National Bank of Dakota, for \$20,000, which was sent to Wells, Fargo & Co., in San Francisco, for collection, and which was in like manner on the same day presented for acceptance, and accepted payable on June 21, 1880. The corporation was without funds to meet these drafts, and was compelled to borrow. Upon application made, the Bank of California agreed to advance the money, if plaintiff, Borland, would indorse the note, or guaranty its payment, but not otherwise. Thereupon plaintiff promised to guaranty the payment

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upon being paid ten per cent per annum interest upon the money he should be required to pay upon his guaranty. A meeting of the board of directors was called to act upon the matter, and met on June 21, 1880. At this meeting a resolution was adopted in pursuance of the previous understanding between the plaintiff and the directors individually, authorizing the president and secretary to execute a note for \$45,000, the amount of the two drafts, payable to the order of A. Borland, A. Hemme, and R. N. Graves, at the Bank of California; the resolution reciting that it was "in order to settle the indebtedness of the company to the Bank of California." The note was accordingly executed and the money obtained with which the drafts were paid. This note went to protest, and was afterwards paid, with interest, by plaintiff, Borland, on August 31, 1880, the amount of interest being \$887.50. Notarial fees for protest \$5. At the time of this payment, plaintiff, Borland, had ceased to be a director in the corporation. On or about September 26, 1880, plaintiff, Borland, paid and took up in like manner on behalf of said corporation a draft of the superintendent of the Wyoming and Dakota Water Company, dated Golden Gate, Dakota, September 10, 1880, in favor of the First National Bank of Deadwood, on the president of said company at San Francisco for \$6,000; and on or about November 1, 1880, another similar draft drawn at the same place, in favor of the same party, dated October 1, 1880, for \$3,500. These drafts were drawn for moneys represented by the superintendent and believed to be used in the business and for the purposes of the corporation, and they were afterwards recognized by the board of directors as properly drawn and paid. Plaintiff, Borland, also paid, on behalf of the said corporation, to Messrs. Garber and Thornton, for legal services rendered to said corporation, Wyoming and Dakota Water Company, in the latter part of 1879, and fore part of 1880, in litigating the right and title of said corporation to the waters of certain streams appropriated to their use as hereinafter stated, and for other legal services relating to the business of the corporation, the sum of \$6,854.15. The moneys so advanced by plaintiff and paid on behalf of said corporation to Messrs. Garber and Thornton, were paid at different times,

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as their services were rendered from August or September, 1879, to August, 1880. The Father de Smet Consolidated Gold Mining Company was a corporation organized and existing under the laws of the state of California, having its principal business office in San Francisco, in the state of California. Its object and its business was to carry on gold mining operations in the said territories of Dakota and Wyoming. It was the first organized of the two corporations herein mentioned, and was a successful and dividend-paying corporation. The plaintiff, Borland, owned 48,000 of the 100,000 shares of the stock of the Father de Smet Company, purchased mostly from the defendants, Haven and Nichols. From the organization of the Wyoming and Dakota Company, the stockholders were identical or nearly so with those in the Father de Smet Company, until the stock in the latter became somewhat scattered. The offices of the two corporations were in the same place in San Francisco, and the same party, Theodore Widman, was secretary for both corporations from the beginning until after the occurrence of the transactions which constitute the subject-matter of this suit. Plaintiff, Borland, was a director in the Wyoming and Dakota Company until he resigned on August 12, 1880, as hereinbefore stated. At the same time he was also a director in the Father de Smet Company till August 12, 1880, when he resigned his position as a director in that company, and another in his interest was elected in his place. On the same day one other director resigned, and another was elected in his place, through Borland's influence, and in his interest, Borland having furnished the stock necessary to qualify both parties so elected to be directors.

Before and on August 20, 1880, defendant, George D. Haven, was a director in the Wyoming and Dakota Water Company, and he so continued a director in said company till he resigned said position at a meeting of said board of directors, held on November 12, 1880, at which meeting he resigned his position as director, and Charles H. Cook was duly elected in his stead. Said defendant, Haven, was also, during the same period, and longer, a director in the Father de Smet Consolidated Gold Mining Company. The two companies, having common stock-

holders, and in part, at least, common directors and officers, worked in harmony. The Wyoming and Dakota Water Company was without funds or resources to construct its canals or carry on its business, except such as were derived from assessments upon its stock, and the Father de Smet Company advanced large sums of money from time to time to said company, which were expended in constructing the water ditches or canals, and other works of said Wyoming and Dakota Water Company; and when the first two assessments of the stock of the latter company were paid, the moneys so paid on assessments were paid over to the Father de Smet Company upon the advances made as aforesaid, but the assessments collected were insufficient to pay all the advances so made from time to time. Early in the month of August, 1880, or before, the Father de Smet Company refused to advance any more money, and demanded a repayment of the balance due on prior advances, which then amounted to about \$90,000. A plan of settlement was suggested, and in pursuance thereof, at a meeting of the directors of the Wyoming and Dakota Water Company, held on August 12, 1880, after the resignation of plaintiff as director, as aforesaid, a resolution was unanimously adopted providing for conveying to the Father de Smet Company all the property of said Dakota Water Company upon the terms that, upon the execution of such conveyance, the Father de Smet Company should assume and agree to discharge all the liabilities of the said Wyoming and Dakota Water Company, amounting to \$150,000, whether the same should be more or less, and make and deliver to said latter company the negotiable promissory notes of said Father de Smet Company, one payable in ninety days after August 13, 1880, for \$100,000 gold coin, and the other, for a like amount, payable six months after August 13, 1880; and should further discharge said water company from all claims, demands, and liabilities by reason of any indebtedness arising from advances and payments already made by the Father de Smet Company to or on account of said water company, and authorizing the president and secretary to execute and deliver such conveyance on the performance by the Father de Smet Company of the conditions indicated. On the same day, August

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12, 1880, the directors of the Father de Smet Company met, and after the resignation of plaintiff, Borland, as director, and the election of his successor, as hereinbefore stated, said board passed unanimously a resolution, the counterpart of that hereinbefore cited, authorizing the purchase and acceptance of the conveyance of the entire property of the Wyoming and Dakota Water Company, and the execution of the notes and discharge of the latter of all of its prior liabilities, and directing its president and secretary to receive the conveyance, and execute and deliver the proper notes and other acquittances and papers. In pursuance of these resolutions the corporations, respectively, by their presidents and secretaries, executed and duly delivered and exchanged the conveyances, notes, releases, acquittances, and papers provided for. Eight days thereafter, on August 20, 1880, the board of directors of the Wyoming and Dakota Water Company held another meeting at which the defendant, George D. Haven, being a director, was present and acted as a director, at which meeting a resolution was, on motion of said defendant, Haven, unanimously adopted, which, after reciting that the said purchase and conveyance of the property of the Wyoming and Dakota Water Company, and assumption of the debts and discharge of the liabilities for advances to said company by the Father de Smet Company, and the execution of the several notes and discharges by the latter corporation to the former, as provided by the said resolutions of said corporations, respectively, passed August 12, 1880, were not satisfactory to the stockholders of the Father de Smet Company, rescinded and annulled the said several resolutions of August 12th, and the transactions had in pursuance thereof, and placed the said parties *in statu quo*. It authorized the president and secretary to receive a reconveyance of the property before conveyed as aforesaid, and upon such receipt to deliver up the notes and other papers received under the arrangement provided for in said prior resolutions. On the same day, August 20, 1880, the board of directors of the Father de Smet Company met, the defendant, George D. Haven, being a director, and present and acting as one of the directors, and at said meeting, on motion of John McGillivray, seconded by said defendant, George D. Haven, a

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corresponding resolution was passed rescinding and annulling the said resolutions of August 12th, and all action had under them; and, on motion of said defendant, Haven, a further resolution was unanimously adopted, to the effect that the reconveyances, exchange of documents, rescinding said action, and canceling the said notes be conducted in accordance with the advice of John Garber, attorney at law. In accordance with these resolutions the Father de Smet Company, on the same day, said August 20, 1880, reconveyed to the Wyoming and Dakota Water Company all the said property before conveyed by the latter to the former, and the Wyoming and Dakota Water Company, in consideration thereof, and of its promise, surrendered to the Father de Smet Company all the notes, releases, acquittances, and papers received from it, and all were canceled, and the whole transactions were thereby rescinded and annulled, and the parties, by mutual agreement, placed *in statu quo*. Afterwards, on November 12, 1880, there was held another meeting of the board of directors of the Wyoming and Dakota Water Company. At said meeting, after receiving and accepting the resignation of defendant, George D. Haven, and the election of his successor, the said board passed unanimously a resolution that said company execute and deliver to the Father de Smet Mining Company, a negotiable promissory note, for the sum of \$90,787.03, said resolution containing the recitation, "said sum being the amount of the existing indebtedness due from the company to the Father de Smet Consolidated Gold Mining Company," said note to be made payable to said company, or order, twenty-four days after date, without grace. The president and secretary were thereby duly authorized to execute said note in the name of the corporation, affix the corporation seal thereto, and deliver it to said Father de Smet Company. This note was for advances made to the said corporation before the said transactions under the said resolutions of August 12, 1880. In pursuance of this resolution a note was afterwards duly executed in the name of the Wyoming and Dakota Water Company, and delivered to the Father de Smet Consolidated Gold Mining Company, which note is in the words and figures following:—

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“\$90,787³/₁₀₀

SAN FRANCISCO, Nov. 12, 1880.

“For value received, twenty-four days after date, without grace, the Wyoming and Dakota Water Company promises to pay to the Father de Smet Consolidated Gold Mining Company or order, the sum of ninety thousand seven hundred and eighty-seven and ³/₁₀₀ dollars.

(Signed) “WYOMING AND DAKOTA WATER COMPANY,
{ SEAL OF } “By THOMAS BARR, President,
{ COMPANY. } “THEODORE WIDMAN, Secretary.”

At a meeting of the board of directors of the Father de Smet Gold Mining Company, also held on the twelfth day of November, 1880, a resolution was unanimously passed authorizing the sale, indorsement, and transfer of said note, and any and all right of action arising thereon in favor of the said payee, to said Borland, in consideration of the payment of the amount named in the note by plaintiff, Borland, and in pursuance of said resolution, the said Borland having paid the said sum named therein to the said Father de Smet Company, the said note was duly indorsed, assigned, and delivered to said Borland in pursuance of the provisions of said resolutions. Said Borland paid this money and took the assignment of the note November 15, 1880. Said payment was made by said Borland on behalf of said Wyoming and Dakota Water Company, in pursuance of an understanding before that time had with the trustees of said company, that he should advance the money for the purpose, and receive ten per cent interest for the money so advanced. Before the payment of said money so advanced, but after the indebtedness had accrued, said Borland had sold to Mr. J. B. Haggin all his interest in both the said Wyoming and Dakota Water Company, and the Father de Smet Consolidated Gold Mining Company. The right to the water of certain streams taken up and appropriated by the Wyoming and Dakota Water Company for the purposes of the corporation, and for the conveyance of which to the place of sale and use, it constructed ditches at large expense, was disputed by other parties, and in a suit vigorously litigated to determine the right and title to those waters, a judgment was rendered against the said corporation.

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some time in August, 1880, which greatly reduced the value of its property, and rendered the stock nearly or quite worthless. Had the corporation been successful in this suit, and sustained its title to the water, it would have possessed one of the most valuable properties in that region of country. After this judgment no further assessments were paid, and no further advances of money made by the Father de Smet Company. At a meeting of the board of directors of the Wyoming and Dakota Water Company, held at the office of the company on February 1, 1881, a resolution was unanimously and duly passed in the words and figures following, to wit:—

“Whereas, the Wyoming and Dakota Water Company is indebted to A. Borland as follows, to wit: *First*, upon a note made by said company to the Father de Smet Consolidated Gold Mining Company, dated November 12, A. D. 1880, payable twenty-four days after date, for the sum of \$90,787.²/₁₀₀ (ninety thousand seven hundred and eighty-seven ²/₁₀₀ dollars), indorsed by said Father de Smet Mining Company without recourse, upon which there is this day due, principal and interest, \$92,365.77. *Second*, for moneys heretofore paid by said A. Borland for legal services rendered said company, the further sum of \$6,854.16. *Third*, for the overdrafts of said company upon the Bank of California for the sum of \$9,829.83, which said Borland has agreed to pay and this day pays. Said three several sums amounting this day to \$109,049.76. Now, therefore, resolved, that this day the said Wyoming and Dakota Water Company execute and deliver to said Borland, its promissory note, due and payable ten days after date, for the sum of \$109,049.76, with interest thereon from date until paid at the rate of ten (10) per cent per annum, and the president and secretary of this company are hereby authorized and directed to execute said note in the name of, and for and on behalf of this company, and the secretary to affix the official seal of the company thereto.”

The said sum of \$109,049.76, indebtedness of said corporation to said Borland mentioned in said resolution, is made up of the several sums paid and advanced on the drafts for \$6,000, the draft of \$3,500, the sum of \$6,854.16 attorney's fees paid to

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Messrs. Garber and Thornton, hereinbefore mentioned, and the note from the Wyoming and Dakota Water Company to the Father de Smet Consolidated Gold Mining Company for \$90,787.03, paid by plaintiff Borland as hereinbefore in the finding of facts stated, and the interest due on said several sums so paid. In pursuance of the authority conferred by the foregoing resolution, a negotiable note for the amount specified as being due was duly executed and delivered to plaintiff, Borland, on said first day of February, 1881. The indebtedness from the Wyoming and Dakota Water Company to the Father de Smet Company for moneys advanced as hereinbefore stated, the balance of which is included in this note, arose and accrued while said Borland was a stockholder in said Wyoming and Dakota Water Company. Prior to said February 1, 1881, and to the passing of said resolution and making of said note, said plaintiff, Borland, had disposed of all his interest in both corporations to J. B. Haggin. On May 17, 1881, the sum of \$11,219.13 was paid and credited on said sum of \$109,049.76 due as aforesaid on February 1, 1881, and on August 18, 1881, the further sum of \$27,455.90 was paid and credited on said sum, and duly applied in part payment thereof. No other or further sums have been paid upon the indebtedness hereinbefore set out, and the balance thereof is now due, together with interest on said sum of \$45,000 at the rate of five sixths of one per cent per month, and interest on the balance of said second sum of \$109,049.76 at the rate of ten per cent per annum, said sums now due to said plaintiff from the Wyoming and Dakota Water Company, aggregating the sum of \$214,855.46 in United States gold coin, on this thirty-first day of December, 1888. Said plaintiff, Borland, before the maturity thereof, indorsed, transferred, and delivered said note for \$109,049.76 to one Samuel McMasters, and the said McMasters as such indorsee and assignee, on the seventeenth day of March, 1881, commenced a suit thereon in the district court of Lawrence County, territory of Dakota, against the said Wyoming and Dakota Water Company, the maker thereof, to recover the amount due on said note, in which suit a judgment was duly entered on April 23, 1881, for the sum of \$111,506.71. Executions were subsequently issued upon

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said judgment, and the property of said defendant sold, and the net proceeds thereof at said sale applied on said judgment in part satisfaction thereof, the said two several payments of \$11,219.13 and \$27,455.90, hereinbefore mentioned as credited as payments on said note, being the said net proceeds of the sales of the property of said company hereinbefore set forth. The said note was held by said McMasters, and said suit brought in his name for the use and benefit of said plaintiff, Borland, as the real owner thereof, and after said judgment and executions, the said judgment and the balance remaining due thereon were duly assigned to said Borland by said McMasters, and at the commencement of this suit said Borland was the real and *bona fide* holder thereof, and entitled to the moneys due thereon. During all the time while the transactions here in question were occurring, the said Wyoming and Dakota Water Company had superintendents in charge of its works and operations in the said territories of Wyoming and Dakota, who were severally duly authorized by resolutions of the board of trustees duly passed, to act as its agent in the construction of its works, and the management of its affairs in said territories, and said agents, in accordance with their prescribed duties, reported monthly to the board of trustees of said corporation at San Francisco the work performed, the character and amount of expenditures on behalf of the corporation, the liabilities incurred, etc., and as authorized, drew their drafts from time to time on the president of the corporation at San Francisco for moneys to meet the expenses thus incurred, in the manner hereinbefore indicated with respect to the several drafts in question, and these reports were accepted as correct and acted upon by the board of directors, and formed the basis of the entries in the books of the corporation upon this subject, the said directors having made no actual personal inspection, and having no actual personal knowledge of the operations of their superintendents, except that upon one occasion plaintiff, Borland, visited the region of the operations of the corporation, and made a general, extensive inspection of the works, passing over and examining ten or twelve miles on each end of the ditch or canal of the corporation; and the transactions now in question, and all other transactions by the board

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of directors of said corporation respecting the affairs of the corporation in said territories, were based upon the said reports and other information received from their said superintendents and agents, and such information as said Borland obtained in his said tour of inspection.

There was due and owing to plaintiff, Borland, from said corporation, the Wyoming and Dakota Water Company, upon the indebtedness alleged in the cause of action in the complaint herein first stated, on the thirty-first day of December, 1888, principal and interest, the sum \$132,351.36 in United States gold coin, and there was due and owing to plaintiff, Borland, from said corporation on said thirty-first day of December, 1888, upon the indebtedness alleged in the cause of action second in the complaint herein stated, principal and interest, the sum of \$82,504.10 in United States gold coin, and the total indebtedness of said corporation to plaintiff, on said thirty-first day of December, 1888, was, and is, the sum of \$214,855.46 in United States gold coin. At the time when the indebtedness first in said complaint stated was incurred by said corporation, the Wyoming and Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of the debts of said corporation and for said indebtedness was 84,448, and at the time the indebtedness second in said complaint stated was incurred by said corporation, the Wyoming and Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders liable to contribute for and on account of the debts of said corporation and for the said last-mentioned indebtedness was 100,000 shares.

Mr. Geo. W. Towle and Mr. John Garber, for plaintiff.

Messrs. McAllister & Bergin, for defendants.

SAWYER, Circuit Judge, after stating the facts as above. The principal question presented on the facts as found in this case, is, whether the defendants, Haven and Nichols, are personally liable to plaintiff, respectively, for a share of the indebtedness of the Wyoming and Dakota Water Company paid by said

plaintiff in the manner stated, proportionate to the amount of stock held by them in severalty, as compared with the whole amount of stock liable to contribute. Section 322 of the Civil Code of California, as amended in 1876, provides that:—

“Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities, as the amount of his stock, or shares owned by him, bears to the whole of the subscribed capital stock, or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. . . . If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt, it shall be dismissed, as to him, upon his paying the costs, or such portion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred, and such liability is not released by any subsequent transfer of stock.”

Thus, taking the several provisions together, a stockholder is personally liable for his proportionate share of each debt of the corporation, and of each debt, only, contracted while he is a stockholder. This section was in force at the time of the adoption of the amended constitution in 1879, and it has never since been changed. Article 12, section 2, of the constitution of 1879 is as follows: “Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law.” And section 3 of the same article, provides that “each stockholder of a corporation . . . shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him, bears to the whole of the subscribed capital stock or shares of the corporation.” Thus the section of the Civil Code, taking its provisions together, is precisely like this provision of the constitution, except by express provision, no one creditor can collect more than the share of his own particular debt of the stockholder, whether he has paid his share of the debts to other cred-

itors or not; but the liability in the aggregate of the stockholders is precisely the same under each, since the aggregate of the stockholder's share of liabilities to each creditor is equal to his share of the liabilities upon the whole debt or liabilities of the corporation. It is urged that the constitution on this subject is not self-executing, but that it requires legislation to give it effect; that section 322 of the Code of Civil Procedure, is inconsistent with section 3 of article 12 of the constitution of 1879, and is, therefore, under section 1, article 22, repealed by it; and, since there has been no other legislation on the subject, since the adoption of the new constitution, to give the constitutional provision effect, that this right of creditors to enforce the personal liability of stockholders has lapsed. Section 1, article 22, referred to, provides "that all laws in force at the adoption of this constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature." If, therefore, the provisions of section 322 quoted are not inconsistent with the provisions of article 12, section 3, they are, in express terms, continued in force. As we have already seen, they are clearly not inconsistent, but in all respects in harmony. Under both, the stockholder is liable in the aggregate for his proportion of all debts and liabilities of the corporation contracted while he was a stockholder, and no more. The constitution does not provide how the liability shall be enforced, whether against each stockholder separately, or all jointly, while the statute goes further, and does so provide for its enforcement, and that provision is not inconsistent with the provision of the constitution, but in the end it reaches the same result. *Larabee v. Baldwin*, 35 Cal. 156, and other cases affirming it, establish this point. Were section 322 to be formally re-enacted now by the legislature, would anybody pretend that it would be inconsistent with the constitutional provision now in question in such sense as to render it unconstitutional and void? I apprehend not. If it would not be inconsistent, and, therefore, unconstitutional, and void, if formally re-enacted, it cannot be inconsistent, and, therefore, repealed now. If it could stand with the constitution upon re-enactment, it can stand with it now. Not being inconsistent, as we have seen, it is in express

terms continued in force. Section 36 of the old constitution provided, that "each stockholder of a corporation shall . . . be individually and personally liable for his proportion of all its debts and liabilities." This, as construed in *Larrabee v. Baldwin*, *supra*, and other cases affirming it, although couched in somewhat different language from that of section 3, article 12, of the new constitution, is in effect identical with the old, except that the new, in terms limits the liability of the stockholders to those debts contracted while he is a stockholder, and the old does not. Yet in the case cited and in other cases the courts so construed the old, although there were no such express terms of limitation. Section 322 of the Code of Civil Procedure, was, certainly, not in conflict with section 36 of the old constitution. If its provisions are not in conflict with the old constitution on this point, they, certainly, are not inconsistent with those of the new. They simply provide for carrying the constitutional provisions into effect—for executing them. The defendants are, therefore, liable, personally, for their respective shares of the indebtedness, unless exonerated or discharged therefrom, on some other ground.

It is insisted, that the only remedy in this case is, necessarily, in equity, as all the stockholders are interested and personally liable for their respective shares, and are necessary parties, and numerous authorities are cited on the point. But the cases cited arose where there was no statute expressly giving a remedy at law. Section 322 of the Code of Civil Procedure of California, still in force, as we have seen, provides, "that any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be entered against each in conformity therewith." This is mere procedure, in an action at law, especially given by the statute. It is not an equity or an admiralty case, and is general in its application, so section 914, Revised Statutes, United States, applies; or if it confers a new right and affords a new remedy to enforce it, a right and remedy so afforded will be enforced, in

a proper case in the national courts. (*Ellis v. Davis*, 109 U. S. 500-503; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756-758.) The question as to the sufficiency of the amended complaint was disposed of, whether, properly or not, on demurrer, and the ruling is adhered to.

I have no doubt that the payment of the several sums of money by plaintiff, Borland, for the benefit of the Wyoming and Dakota Water Company, under the circumstances detailed in the statement of facts, constitute debts, or liabilities of the corporation within the true intent and meaning of the constitution, and statutes for which stockholders of corporations are rendered personally liable, to the extent of their due proportion. That a stockholder, and even a director, may, in a proper manner, become a creditor of a corporation, is settled. (*Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*, 97 U. S. 13; *Santa Cruz Railroad Co. v. Spreckles*, 65 Cal. 193; *Hallam v. Hotel Co.* 56 Iowa, 178. See, also, *Harts v. Brown*, 77 Ill. 226; *Sanborn v. Lefferts*, 58 N. Y. 179; *Brinham v. Coal Co.* 47 Pa. St. 43-49; *Hope v. Valley Co.* 25 W. Va. 789; *Cook, Stocks*, 660, 663; *Duncomb v. Railroad Co.* 84 N. Y. 190; 88 N. Y. 1; *Harpending v. Munson*, 91 N. Y. 650.) The note for \$45,000 does not, in my judgment, come within the principle of the decision in *Wilbur v. Lynde*, 49 Cal. 290, and other cases cited by the defendant, conceding, for the purposes of the argument, that they were correctly decided. The transaction was, in fact, between the Wyoming and Dakota Water Company and the Bank of California, not between the corporation and Borland. The bank declined to advance the money to take up the two drafts on the corporation, one for \$25,000, and the other for \$20,000, unless Borland would guaranty the payment of the loan, but agreed to advance it upon his guaranty. Now the form of the note was simply the mode adopted to effect this guaranty. The note was made payable, in form, to Borland, Hemme, and Graves and indorsed by them, and delivered to the Bank of California, this simply being the ordinary form of such transactions with banks. The transaction was between the Bank of California and the corporation, and not between the corporation and the nominal payees of the note. The consider-

ation of the note was advanced by the bank to the corporation, on the note and indorsement, and not by, or to, Borland, or on the unindorsed note. The transaction is substantially, so far as the corporation and Borland are concerned, the same as if the note had been jointly made to the bank, as payee, by the corporation and Borland, as joint makers, instead of its being made payable, in form, to Borland, and indorsed by him to the bank. The money was not advanced on the note, but on the indorsed note. The note went to protest, and Borland afterwards paid it, with the interest, on his guaranty, after he ceased to be a director, and the liability of the corporation to him arose from this payment, as guarantor, and not upon any advances made to him, or by him on the note as payee of the note. I have no doubt, that this note, taken in connection with the explanatory oral testimony, and the drafts taken up with the proceeds, are entirely competent to show exactly what the transaction in its entirety was. What the effect of the transaction, in its entirety, upon the rights of the parties, was, is another question. The facts constituting this entire transaction could only be proved by the kind of testimony introduced, oral testimony in connection with the notes and the record evidence, of the action of the directors, and the facts as set forth in the statement, are, clearly, established by the evidence.

Defendants insist that they were not stockholders at the time the indebtedness in question was incurred, and for that reason, that they were not personally liable. Section 324 of the Civil Code of California provides, that "shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the numbers or designation of the shares, and the date of the transfer." And the rules and regulations of the company forbade the transfer of the stock on the books of the company, while there were any unpaid assessments existing upon it. Under the provision of the statute cited, so long as a transfer of stock, however absolute in terms,

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properly remains unrecorded on the books of the corporation, the party in whose name the stock stands, as between himself and the corporation, or its creditors, must for all purposes be deemed the owner of the stock. (*People v. Robinson*, 64 Cal. 373; *Irons v. Bank*, 27 Fed. Rep. 595; *Price v. Whitney*, 28 Fed. Rep. 297; *Evans v. Bailey*, 66 Cal. 112. See, also, *Cook, Stocks*, 262; 2 *Morawetz on Private Corporations*, 856; *Taylor on Corporations*, 748; *State v. Ferris*, 42 Conn. 560; *Fowler v. Ludwig*, 34 Me. 455; *Bank v. Cutler*, 49 Me. 315; *Dane v. Young*, 61 Me. 160; *Shellington v. Howland*, 53 N. Y. 371.) But, in this case a transfer could not be lawfully made upon the books for the reason, that there was an unpaid assessment upon the stock of one dollar a share, at the time of the alleged assignment of the certificates of stock; and for that reason, the then president of the company, Thomas Barr, refused to sign the transfer of the shares held in his own right by Haven, or to permit the entry inadvertently partly made by the secretary to remain on the books, and the incomplete entry was canceled thereon. But this transfer, such as it was, for the purpose of putting 100 shares in the name of Clay, was not made till November, 1881. The inchoate transfer on the books is dated November 29, 1881, and Roberts testifies that the certificate was handed to him but a few days before this effort to have a transfer made on the books, and the secretary testifies that it was made very soon after receipt of the certificate. Although Haven has an indefinite idea, that he delivered the certificates to Roberts in December, 1880, it is, entirely clear, from the evidence, that this was not done till some time in November, 1881, and the indebtedness in question all accrued before February 1, 1881, long before the pretended disposition of the stock, and the liability of Haven would not have been affected had the transfer attempted on November 29, 1881, been completed and been valid. There never was any attempt to transfer Nichol's stock upon the books of the corporation, nor was the fact that he had actually assigned his certificate, if he ever did assign it, as to which I have grave doubts, ever been brought to the attention of the corporation or its officers. Both Haven and Nichols, therefore, were stockholders in the corporation, when the indebt-

ness accrued, in such sense, as to render them personally liable under the constitution and statutes, for their due proportion thereof.

It is next contended that the conveyance of the property of the Wyoming and Dakota Water Company to the Father de Smet Company, and the release of the former from all indebtedness to the Father de Smet Company by the latter, as set forth in the statement of facts, extinguished all indebtedness for the advances before that time made by the Father de Smet Company, and that the liability could not thereafter be re-instated, as against a stockholder without his consent, whatever might be the case with reference to the corporation. If it was competent for the Wyoming and Dakota Water Company to convey all its property to the Father de Smet Company, and for the latter, in consideration thereof, to release all prior indebtedness for all advances made, and to execute in addition thereto in favor of the former company two valid promissory notes for \$100,000 each, it is not apparent to me, why the transaction, by mutual agreement, might not be reversed, and the property reconveyed, upon a restoration of the consideration received, the liability revived, or new liability created, and the parties placed *in statu quo*. The transactions are of precisely the same character, and if it was competent for the two corporations to make the first transaction, it is not apparent to my mind why they did not have the power to make the second. The property conveyed by the Wyoming and Dakota Water Company was the kind of property, which it was organized to obtain, manage, and enjoy; and, having conveyed it away, leaving nothing of the kind with which to carry on the business for which it was organized, it was, certainly, authorized to purchase other property of the kind, with the same consideration which it received for the property sold, and if it could legally purchase other property of the kind, why not repurchase, for the same consideration, that before held, sold, and conveyed? There can be no doubt, I think, that it was entirely competent for the Wyoming and Dakota Water Company to repurchase this property from the Father de Smet Company, and create a liability for moneys as a part of the consideration, and give its note therefor so as to be binding upon

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the corporation. If so, then the liability thus created against the corporation being valid as against the corporation, it must, necessarily, be valid against the stockholders of the corporation; for the constitution and statutes expressly make the stockholder personally liable for his "proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder." There can be no such thing as a valid debt, or liability against a corporation, contracted while a party is a stockholder, without that stockholder being at the same time personally liable for his proportionate share. If, therefore, it was competent for the corporation to rescind their agreement by a contract, valid as to the incorporators, and place the corporation *in statu quo*, or to create a new but similar liability, that would be binding upon the corporation, that act must, necessarily, be equally binding upon a party who, at the time, was a stockholder in the corporation. At the time of these two transactions, both defendants were stockholders. The transactions, I have no doubt, were valid and binding upon the two corporations, and created corresponding corporate liabilities; and being so, the stockholders were also liable for their appropriate share. But more than this, these transactions were not without the assent of these defendants. The stock stood in the name of Haven as trustee, but he held the equitable, as well as the legal, title to 2,500 shares, and the other 2,500 shares he held as trustee for Nichols. He was not only a stockholder, but he was at the time of these transactions, a director in both companies. He attended the directors' meeting in person, of the Wyoming and Dakota Water Company, as director, and acted as such, and it was on his motion that the resolution rescinding the contract between the two corporations, whereby one conveyed its entire property to the other, and in consideration whereof all indebtedness of the party so conveying before executing was released. And this was not all. He, also, on the same day, attended the meeting of the Father de Smet Company as director, and acted as such, and it was on the motion of another director, seconded by himself, that the corresponding resolution was, unanimously, passed by that corporation, rescinding the former transaction. So that, he directly assented, as a director, and stockholder also,

in both companies to the contract rescinding the former transaction, reviving the liability of the Wyoming and Dakota Water Company to the Father de Smet Company and placing the parties *in statu quo*. Indeed, since the stockholders of the Father de Smet Company were the dissatisfied ones, as shown by the recitals in the resolution, it is not improbable that he was himself one of the parties anxious to rescind. However this may be, it does not now lie in his mouth to say that this liability could not be re-instated in such sense as to bind a stockholder, without his assent. He is estopped from setting up such a pretense. I have no doubt, therefore, as to the validity of this proceeding, and that the defendant's personal liability continues.

With reference to the books of the corporation, none were introduced of the character, or for the purpose shown in the case of *Neilson v. Crawford*, 52 Cal. 248, cited by defendants. The ledger and day-book kept by a clerk were not introduced to show charges against the corporation, nor were they introduced at all. The only books introduced were the record of the stock transfers to show that defendant's stock had not been transferred on the books, and the records of the proceedings of the board of directors at their various official meetings, to show what the official action of the directors and board was at those meetings. Those records were, certainly, competent to show what the official action of the board of directors was. Indeed, it was the only competent evidence for that purpose. What effect that official action had upon the rights of the parties, is quite another question. The directors, are certainly, the agents of the stockholders, elected by them, and acting as such under their authority. They are not mere clerks of the corporation, performing ministerial duties only. The records are open to the inspection of the stockholders, and if the directors, representing a majority of the interest of the stockholders, abuse their trust, the statute affords a remedy to the minority wronged by their action. But no such abuse has been alleged in the answer, or shown by the evidence in this case, and the defendant, Haven, was a director himself, as well as a stockholder.

Nearly, if not all of the evidence introduced in this case by plaintiff was objected to by defendants, and taken under objec-

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tion and exception to be considered and ruled upon by the court in the light of all the testimony, when the whole case should be before it. One part of the testimony often supplements and throws light upon and illustrates the other. All oral testimony to establish the advance of money by the plaintiff for the benefit of the corporation, was objected to because the matters ought to be of record, and the record would be the best evidence; and, when record evidence was offered, it was objected to because, although it might be competent to establish a liability against the corporation, it is not competent to affect the personal rights of a stockholder of the corporation. Under the principles insisted upon by defendants, I apprehend that it would be very difficult to establish the personal liability of a stockholder to a creditor of the corporation, and that this security or liability provided by the constitution and statutes, would be wholly illusory. In my judgment it is perfectly competent to show by the official record of the action of the board of trustees duly assembled, that for instance A. B. was by resolution unanimously passed, duly appointed, and authorized to act as superintendent of the corporation and general manager of its affairs, in Dakota and Wyoming territories, and by parol evidence that the corporation had property in each of those territories, and that A. B. did in fact take the charge and management of its affairs in those regions in pursuance of said appointment; that he in fact made monthly reports of his operations and expenditures in the construction of the ditches and works of the company in those territories, there being no question as to the specific contents of those reports; and that he drew drafts upon the said corporation at San Francisco for moneys required for his operations; that the directors received and acted upon those reports as correct, and in fact paid such drafts, and that it is competent in corroboration of this oral testimony, and to show the dates, amounts, acceptance, etc., to introduce the drafts themselves, upon proper proofs of their genuineness; that it is competent to prove by oral testimony, that the corporation had no money with which to take up the drafts, as they became due, and it was necessary to borrow money for the purpose; that upon negotiation with a bank for a loan of money, it was ascertained that the money

could not be got on the note of the corporation alone, but could be had upon the note of the corporation indorsed or guarantied by the plaintiff; and that this condition of things was brought to the notice of the directors, and this being so shown, that it is competent to show by the records of the board, that at a meeting duly held for the purpose, a resolution was passed, authorizing the president to execute a note for the amount of money wanted, to be indorsed by the plaintiff as surety, and fixing the rate of interest to be paid on the loan; and then to show, by parol testimony accompanied by the note itself, that the note was in fact executed, indorsed, and delivered in pursuance of said resolution, and the money received thereon, and the drafts taken up with it; and to further prove that the note so executed upon which the money was obtained went to protest, and that it was paid and taken up by the indorser and surety. If this kind of testimony is not competent to prove these facts, as against a stockholder, I should like to be informed by counsel, how such facts are to be proved, in such manner as to fix the liability of a stockholder. Testimony of this kind and similar testimony was introduced—parol testimony where there was no evidence in writing or of record, and record and written evidence, where there was a record, or writing, amply sufficient if admissible, for the purpose, to establish all the facts set out in the statement of facts found in this case. The facts undoubtedly exist, as stated, and the real question is, what are the legal rights of the parties arising upon the facts.

But because Mr. Borland and the directors were not present in Dakota, and did not know from personal observation and knowledge, all that was done, and there was no proof by parties having personal knowledge, precisely of all the work that was done in Dakota, and whether the money drawn from time to time by the superintendent on the authority of the directors was actually all, in fact expended for the purposes set forth in the monthly reports, it is insisted, that the action of the board of directors in raising the money and paying the drafts upon the representation of the superintendent and reports upon which the board acted, however valid as against the corporation, is not binding upon a stockholder, and can impose no personal liability

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upon him—that the directors could not create liabilities upon hearsay evidence. The directors of great corporations having business far away from the central office, and often in distant, and even in foreign countries, must act upon the reports of their authorized agents. No other mode of conducting their business is practicable, or even possible. They cannot possibly have personal knowledge of every act performed in the name of the corporation, and if they cannot render the corporation liable for acts performed beyond the reach of their own observation, they cannot carry on the business of the corporation, at all. The directors of the Wyoming and Dakota Water Company were, certainly, authorized to act upon the information derived from their authorized agents in the regular course of their business, and in so acting, to borrow money for its supposed uses and bind the corporation for its payment; and those who advance it, or become responsible to those who do, and are thereafter compelled to take up the obligations, are not bound to look to the correct application of the money so raised. It was only necessary for plaintiff to show that the directors acted in good faith upon information received from their agents in the usual course of business. It was not necessary to show how all the money was expended; and no effort was made to do so either by hearsay evidence or otherwise. These transactions are certainly valid as against the corporation, whether the moneys were properly applied by the authorized agent of the corporation in Dakota or not; and in a suit against the corporation by the Bank of California, for the moneys advanced, or by the sureties on the note to the Bank of California, who were compelled to pay the money to the bank, the evidence in this case would have been admissible. If, on the facts disclosed and proved, a valid claim exists against the corporation itself; if the corporation would be liable on the state of facts shown, then of necessity, under the constitution and statutes, every stockholder, at the time the liability accrued, must be liable for his appropriate share, as he is liable for his share of all such debts and liabilities of the corporation. There can be no liability of the corporation, without a corresponding personal liability of its stockholders under the constitution and laws. If the board of directors

could by the facts shown create a liability against the corporation, then the same facts must create a personal liability as to the stockholders. And the objection really goes to the effect of the facts, rather than to the kind of proof; and the facts shown are proved by the only kind of testimony by which proof is susceptible. The plaintiff made no effort to prove how, or for what particular purposes the funds realized on the drafts of the superintendent were expended, nor was it necessary to make any such proof. There was then, no hearsay testimony on those points, as there was no testimony at all. The testimony went to the question as to what the directors acted upon, not as to the truth of the reports. It is sufficient that the directors of the corporation acted upon the information received from their superintendent, in the ordinary course of business, whether that information was correct or not, and, that, being satisfied as to the propriety of their action, they created the liability upon the corporation in the manner set out in the statement of facts. These acts were within the scope of their powers, and duties, even if the reports upon which they honestly based their action should turn out to be erroneous or even in some particulars, fraudulent. The question is, what did the directors do upon the information they had from the agents, not whether that information was in all particulars correct or not.

But there is no charge that the moneys raised in the mode stated were not in all respects legitimately expended in the proper business of the company, and there was no occasion for hearsay evidence, or other evidence, on that point. There is no averment in the answer that there was one dollar improperly raised or improperly expended by the directors, their agent, or anybody else. The answer simply denies that the plaintiff, Borland, advanced, or paid any moneys at all for the benefit of the Wyoming and Dakota Water Company, as alleged in the complaint. And there is not only no averment, in the answer, but not a particle of evidence tending in the slightest degree to show that one dollar of the money advanced by Borland on the \$45,000 note, or the \$6,000 and \$3,500 drafts, or the \$6,854.15 paid to Garber and Thornton, or of the money advanced by the Father de Smet Company, the balance of which was, afterwards,

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included in the note set out to the Father de Smet Company, was ever improperly expended, or used for any purpose other than the legitimate objects of the corporation; nor is there a particle of testimony tending to show that every dollar claimed was not advanced and paid by plaintiff exactly as is indicated by the testimony on behalf of the plaintiff. The defendants rest, alone, upon the points, that the evidence introduced by the plaintiff is incompetent to establish the facts proved, as against the defendants personally, or being proved, that the facts established do not impose a personal liability upon the defendants, and upon their allegation that they were not stockholders at the time the indebtedness accrued. As to the money paid to Garber and Thornton, they rely upon the additional defense, that the action is barred by the statute of limitations. As to the statute of limitations, the first money paid to Garber and Thornton was in August or September, 1879, and the last in August, 1880. The payments were made from time to time as the services of the litigation proceeded. But the transaction and service were continuous, and may be regarded as one transaction, and the payment of items in a running account. The last payments were within the statutory period, so that the bar does not attach to any part. Besides, the defense is an affirmative one, set up by the defendants themselves, and it devolves upon them to show, affirmatively, that the bar has attached, and to what part. Now, it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid. The defense, therefore, on on both grounds must be overruled.

A judgment in favor of McMasters against the Wyoming and Dakota Water Company recovered upon the \$109,049.76 note, given by the corporation to the Father de Smet Company for balance of advances made by the latter to the former, and proceedings thereunder, was introduced in evidence by plaintiff, under objection by defendants, that, a judgment against a corporation is not competent evidence in an action by a creditor against a stockholder of the corporation, to enforce a personal liability. There are some authorities, including some New York

cases, apparently depending upon peculiar statutes of that state of a highly penal character, that seem at first blush to sustain this view. But I think they are inapplicable. However that may be, the weight of authority appears to be very largely to the effect, that a judgment against a corporation for a corporate debt, is, at least, *prima facie*, if not conclusive, evidence against the stockholders therein, when sought to be held liable for such debt; and many of the authorities seem to hold it conclusive, except upon proof of fraud, or collusion, or when there is a defect of jurisdiction. (2 Morawetz on Private Corporations [2d ed.], 886; Cook, Stocks, sec. 209; Taylor on Corporations, sec. 737; Freeman on Judgments, sec. 177; *Domworth v. Coolbaugh*, 5 Iowa, 300; *Grund v. Tucker*, 5 Kan. 47; *Carne v. Brigham*, 39 Me. 35, 40; *Milliken v. Whitehouse*, 49 Me. 527; *Thayer v. Lithographic Co.* 108 Mass. 523, 528; *Hawes v. Anglo-Saxon Co.* 101 Mass. 385; *Bohn v. Brown*, 33 Mich. 257; *Slee v. Bloom*, 20 Johns. 669; *Schaeffer v. Insurance Co.* 46 Mo. 248; *Hoagland v. Bell*, 36 Barb. 57; *Hastings v. Drew*, 76 N. Y. 9-15; *Stephens v. Fox*, 83 N. Y. 313; *Wilson v. Coal Co.* 43 Pa. St. 424; *Bank v. Chandler*, 19 Wis. 457; *Glen v. Springs*, 26 Fed. Rep. 494.) This appears to me to be the better view. At all events, it is not a matter of any consequence, in this case, for the liability is fully made out by the oral evidence, various notes, and the record of the action of the boards of directors of the two corporations, prior to and independent of this judgment. It might just as well have been omitted. Indeed, it seems to have been introduced merely to complete the history of the transactions under investigation, and to show the payments made and credited on the liability alleged in the complaint, which payments and credits were denied in the answer. The payments credited, were, in fact, the two sums realized upon the sales of the property upon executions issued upon this judgment, shown by the return of the sheriff upon the executions issued and filed in the case. Indeed, this record seems to be favorable to the defendants rather than against them, as it proves payments of a considerable amount. At all events, the case was fully made out without it, and it can do no harm, even if erroneously admitted.

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I am fully satisfied that the plaintiff is entitled to recover. I cannot go through the long record, and rule, specifically, and independently, upon every exception taken to the evidence by defendants. I have indicated the character of the important evidence, and the exceptions thereto, and given examples of that upon which I have acted in deciding this case. The other evidence considered is largely of a similar kind, and the exceptions of like character. It is necessary to consider one part of the evidence, in its relation to others, in order to decide, intelligently, upon its admissibility. Generally, therefore, I overrule the objections taken by defendants.

Should a bill of exceptions be required, it would, necessarily, include nearly all, if not the whole evidence in the case, as there is very little, that was not taken under objection on some ground on the part of the defendants, and it is necessary to consider one part as illustrated by the others. The facts I have taken pains to set out very fully, and at large, in the findings; and the question, after all is, what is their effect upon the rights of the parties? The case can better be disposed of upon the facts, than upon rulings upon specific isolated items of evidence. If the acts of the parties, as set out, constitute a liability against the corporation, then they must create a personal liability upon each stockholder for his proper share. As before stated, there can be no liability on the part of the corporation without creating a corresponding liability for his share against the stockholder. It may well be that a fraudulent and collusive transaction between the party in whose favor the liability is sought to be created, and the directors of a corporation intentionally co-operating together, could not cast any personal liability upon a stockholder; but, then, such a transaction would be equally void as to the corporation. I cannot now, conceive of a case in which there is a valid debt, or liability, against the corporation where there would not, under the constitution and statutes, be a corresponding proportionate personal liability against a party, who was a stockholder, at the time when the debt, or liability was incurred. If this be so, then, the only question as to the liability can be, is there a liability against the corporation? And if that be so, then any evidence, that is competent to estab-

lish the liability, as against the corporation, must be competent to establish the liability, of the stockholders, for the liability of the corporation being established, the liability of the stockholder for his share, follows as an inevitable legal consequence by the express terms of the constitution and statute. But in this case there is no evidence at all of any collusion or fraud—nothing to show that the indebtedness in question was not honestly contracted for the legitimate purposes of the corporation, and honestly paid by the plaintiff, Borland, who was, like the defendants, personally, liable for his proper share. It would seem from a consideration of the whole case, upon the evidence before the court, that the stockholders of the two corporations mentioned in the findings, acted in concert proceeding harmoniously, and satisfactorily, while the Wyoming and Dakota Water Company had a prospect of acquiring, and enjoying a large and valuable property. While the prospects were good, the assessments to meet the expenses of their operations were, cheerfully, paid by the defendants, as well as others. But when the right to the water upon which the value of the investment of the water company wholly depended, was adjudged against them, after a vigorous litigation, their hopes were blighted, and their investment became nearly worthless. Then the stockholders declined to pay the assessments levied to meet the liabilities of the corporation, and the plaintiff, Borland, alone being a large, if not the largest stockholder, assumed the burden, and paid off the existing indebtedness. If, this be so, it is but consistent with justice and common honesty, as well as the requirements of the law, that the defendants should be required to refund to him their just share of the amounts so paid. Let judgment be entered for plaintiff, against each defendant, for his portion of the amount due as stated in the findings, with costs.

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JAMES SWIFT v. S. S. MEYERS ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 24, 1888.

1. NOTICE IN SUMMONS IN A SUIT TO ENFORCE THE LIEN OF A MORTGAGE.—A suit to enforce the lien of a mortgage is not one to recover money or damages only, and therefore the notice inserted in the summons must be according to the direction in subdivision 2 of section 53, Comp. 1887.
2. JUDGMENT OF STATE COURT IN THE NATIONAL COURT, SITTING IN THE SAME STATE.—The judgment of a state court may be collaterally questioned or attacked in a national court, sitting in the same state, for a want of jurisdiction over the subject-matter, or of notice to the defendant, the same as if it was a judgment of a court of another state.
3. SUIT TO ENFORCE THE LIEN OF A MORTGAGE.—A suit to enforce the lien of a mortgage by the sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident or not found, so that he cannot be personally served with process, in the state, the court may decree a sale of the property on such substituted or constructive service of process on the mortgagor as the legislature may provide; but in such case there is no presumption in favor of the jurisdiction of the court, and unless the record shows a compliance in all essential particulars with the statute authorizing such service its decree is null and void.
4. CASE IN JUDGMENT.—A statute of Oregon (Comp. 1887, sec. 54) provides that if a defendant in a suit cannot be found, service of the summons may be made by delivering a copy of the same "to some person of the family . . . at the dwelling-house or usual place of abode of the defendant." In a suit to enforce the lien of a mortgage on property in Linn County, the return of the sheriff showed that the defendant could not be found, and that a copy of the summons was delivered to a "member" of the family, "at his usual place of abode in said (Linn) county," on which service the court gave a decree by default for the sale of the property under which the defendants claim. *Held*, that the service was invalid and the decree of sale thereon null and void, because the return did not show that the substituted service of the summons was made at the defendant's usual place of abode *in the state*, in whatever county it might be, but only at his usual place of abode *in Linn County*.
5. CONTRADICTING A RECORD.—*Semble*, that the record of a court cannot be collaterally impeached or contradicted except by a suit in equity, brought for the purpose of setting aside a judgment, on the ground that in fact the court never acquired jurisdiction to give the same.

Before DEADY, District Judge.

Mr. Scott Beebe, for the plaintiff.*Mr. Albert H. Tanner* and *Mr. Charles E. Wolverton*, for the defendants.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendants, citizens of Oregon, to

recover 377.77 acres of land, situate in Linn County, Oregon, exceeding in value \$6,000.

The case was tried by the court without the intervention of a jury, upon the amended complaint, answer, and reply thereto; and a stipulation as to the facts.

From these it appears that on and prior to October 16, 1879, Philip Grigsby was the owner of the premises in question, subject to a mortgage thereon, given to the state commissioners for the management of the school fund, to secure the payment of \$4,500, with interest, theretofore borrowed by Grigsby from said commissioners; that on said date a suit theretofore brought by said commissioners against Grigsby to enforce the lien of said mortgage was pending in the state circuit court for said county, in which a summons had been issued, directed to said Grigsby, requiring him "to appear and answer the complaint" therein within the time specified, and notifying him that if he failed so to appear and answer, "the plaintiffs will apply to the court for the relief demanded" in the complaint; that said summons was returned by the sheriff of said county with the following certificate or proof of service annexed thereto: "I hereby certify that I have served the annexed summons in Linn County, Oregon, on the sixteenth day of October, 1879, on the therein-named defendant, Philip Grigsby, he not being found, by leaving a copy thereof, . . . together with a copy of the complaint, . . . with Mary Backus, a member of the family over the age of fourteen years, at his usual place of abode in said county;" that thereafter said circuit court gave a decree in said case by default in favor of the plaintiffs therein, on which the interest of Grigsby in the premises was sold on execution, and the proceeds applied on the demand of the plaintiffs, and in discharge of said lien; that said sale was duly confirmed, and a conveyance of the premises made in pursuance thereof to the purchaser, J. W. Meyers, under whom the defendants claim; and that the plaintiff, on April 26, 1888, received a conveyance from Grigsby of all his interest in the premises.

The stipulation concludes that if the "summons" is valid, and the "return" is sufficient to show due service of the same

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on Grigsby, the defendants are entitled to judgment in the action, but if not, the plaintiff is entitled to judgment.

It is contended by the plaintiff that the decree of the circuit court of Linn County, under which the defendants claim, is void and of no effect, because the court had no jurisdiction in the premises.

The grounds of this contention are: (1) The summons was invalid, because it did not contain a notice that the plaintiffs would, if the defendant failed to answer the complaint, take judgment for a sum specified therein, but only that in such case they would apply to the court for the relief demanded in the complaint; and (2) the return of the sheriff does not show a valid service of the summons, because (a) it appears therefrom that it was "left" with Mary Backus and not "delivered" to her; (b) it does not appear whether Mary Backus was a member of her own family or of the defendant's; and (c) it does not appear that the summons was served at the "usual place of abode" of the defendant in the state, but only "in Linn County."

The statute (Comp. 1887, sec. 53), provides: "That there shall be inserted in the summons a notice in substance as follows: (1) In any action for the recovery of money or damages only, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint; (2) in other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein."

By section 55 (Comp. 1887) it is further provided that: "The summons shall be served by delivering a copy thereof, together with a copy of the complaint . . . as follows:" (Here follow five subdivisions, the first four of which relate to the service on corporations and persons under guardianship.) The fifth one provides: "In all other cases to the defendant personally, or, if he be not found, to some person of the family, above the age of fourteen years, at the dwelling-house or usual place of abode of the defendant."

These provisions concerning a summons and its service in an action at law, are equally applicable to a summons and its service in a suit in equity, to enforce the lien of a mortgage. (Comp. 1887, sec. 389.)

The suit against Grigsby was not, in my judgment, a suit to recover money only; primarily it was brought to ascertain and enforce a lien on the real property in question, and obtain a judicial sale of the same, and the application of the proceeds thereof in payment of the debt the mortgage was given to secure. (Comp. 1887, sec. 414.)

It is true that in case a mortgagor has given a personal obligation for the debt, the law authorizes the court to "decree a recovery of the amount of such debt against" him, as well as to decree a sale of the property to satisfy the same. But the decree *in personam* for the recovery of the money is not the "only," nor even the principal object of the suit. At least, it is merely a conditional decree and cannot be enforced until the property adjudged to be sold is disposed of, and then only in case the proceeds of such sale are not sufficient to satisfy the decree. (Comp. 1887, sec. 417.)

The notice in the summons was properly given under the second subdivision of section 53; and a copy of the complaint having been served at the same time, the defendant was fully informed of the nature of the decree that might be taken against him in case he failed to answer.

The last objection to the validity of the service will be considered first.

It does not appear that a copy of the summons was delivered "to some person of the family . . . at the dwelling-house, or usual place of abode" of the defendant. What does appear is this, a copy of the summons was "left" with "a member of the family over the age of fourteen years at his (the defendant's) usual place of abode *in said (Linn) county.*"

A suit to enforce the lien of a mortgage is a local one, and can only be brought in the county where the land lies. (Comp. 1887, sec. 387.) But the defendant may be served with the summons in any county of the state in which he may be found. (Comp. 1887, secs. 52, 54.)

There is no presumption that Grigsby was a resident of Linn County because the suit to enforce a lien on real property belonging to him therein was brought there. It could not have been brought elsewhere. For aught that appears, he may have resided

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in any other county in the state. And if “found” anywhere therein, whether commorant or itinerant, he could have been served by delivering to him personally a copy of the summons. But if not so “found,” then he could only be served by the delivery of a copy of the summons “to a person of the family” —the family of which he constituted a part, whether as head or member — “at his dwelling-house, or usual place of abode.”

It is self-evident that a defendant can have but one unqualified, “usual place of abode” in the state, at the same time. If he has other places of abode therein, as he may have, they are his *unusual* places of abode. A defendant may be served personally anywhere in the state that he may be “found,” but if served constructively, by the mere delivery of a copy of the summons for him to the person designated by the statute, it must be done at his “usual place of abode” in the state, in whatever county that may be. And if he has no such place of abode, and cannot be found, he must be served by publication. His usual place of abode in a particular county is not necessarily his usual place of abode in the state. A person may reside eleven months in the year in Multnomah County, and one month in the year near the beach in Clatsop County. He may have a fixed and well-known residence in each county. But can there be any question in which county his *usual* place of abode is, within the meaning of the statute regulating the service of a summons? Certainly not. It is in Multnomah County. Now suppose a suit was commenced against this person in Clatsop County to divest him of some interest in real property therein; the sheriff might leave a copy of the summons at his residence in Clatsop County with his housekeeper, or with “some person of the family” with whom he always resides when in the county, and then truly return that the defendant not being found, he had served the summons by leaving a copy thereof with such person “at his usual place of abode in Clatsop County;” and do this, notwithstanding he and the plaintiff might both well know that the defendant had not been in the county for nearly eleven months, and was then, and had been for years, a permanent resident of Multnomah County, in which was his usual place of abode in the state.

In *Brown v. Langlois*, 70 Mo. 226, it was held under a similar statute, that service of a summons, by leaving a copy "at the usual place of abode" of the defendant, "when in the city of Cape Girardeau," was invalid; and that a judgment by default thereon was a nullity.

In *Allen v. The Singer Manuf. Co.* 72 Mo. 326, service of process by leaving the same "at the Hardin House, the usual place of abode of the" defendant, "prior to the time he left the state," was held bad, because it did not show that the writ was left at a place which was the abode of the defendant at the time of service.

In *M. C. Bank v. Suman*, 79 Mo. 527, a service by leaving process at the "last usual place of abode" of the defendant was held invalid, because, *non constat*, that his "last" place of abode was his present one, and the return could have been true, and the defendant "reside in another county or jurisdiction."

In *Dawson v. The Bank*, 3 Ark. 505, and *Parks v. Weems*, 9 Ark. 439, it was held that service of a summons at the residence of the defendant, by delivering a copy to a person present there, whom it did not appear from the return was "a member of the family," is bad and will not support a judgment by default.

In *Sanborn v. Stickney*, 69 Me. 343, it was held that a return on a writ, that it was served on the defendant by leaving a copy of the summons for him "at his last and usual place of abode, in *Kennebec County*," did not show that the summons was left at the defendant's "place of last and usual abode," as by statute required. Upon this service there was a judgment by default, and afterwards on this judgment there was an action brought in the same state, and the invalidity of the service was relied on as a defense. The court said: "The point taken in the defense is that 'his last and usual place of abode in *Kennebec County*' would not be his 'place of last and usual abode' in the state. We concur in that interpretation of the officer's return. . . . All the officer certified may be true and no service be made. The officer would not be liable for making a false return. But he made an indefinite, equivocal, and insufficient return. It must be certain that a defendant has been legally notified before judgment can properly go against him."

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In *Ames v. Winsor*, 19 Pick. 247, the return was to the effect that the summons had been left for the defendant "at his last and usual place of abode" known to the officer serving it, in the city of Boston. The statute required the summons to be delivered to the party or left at his "dwelling-house or place of last and usual abode." It was held that the service was insufficient.

In *Settlemier v. Sullivan*, 97 U. S. 444, it was held that the service of a summons under a similar statute (Or. Stats. 1855, p. 86, sec. 29), by delivering a copy thereof to the wife of the defendant at the usual place of abode, when the return did not show that the defendant could not be found, was invalid, and the judgment by default taken thereon null and void.

In delivering the opinion of the court, Mr. Justice FIELD said: "The inability of the officer to find the defendant was not a fact to be inferred, but a fact to be affirmatively stated in his return." To the same effect is the ruling in *Trullenger v. Todd*, 5 Or. 39.

In *Earle v. McVeigh*, 91 U. S. 503, it was held that where, during the absence of a person and his family, a statute authorized the notice of a suit against him to be posted upon the front door of his "usual place of abode," that a notice so posted seven months after the house had been vacated by the defendant and his family was not posted on his "usual place of abode," and a judgment founded thereon was absolutely void. The court says: "By the expression, 'the usual place of abode,' the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted, and constitute a compliance with the legal requirement."

In these cases, the question of the validity of the service sometimes arose on a direct proceeding, and in others collaterally, but in all alike, it was held that the same being insufficient the court acquired no jurisdiction thereby, and its judgment thereon was null and void.

In none of them, however, but *Earle v. McVeigh* was the record concerning the service contradicted by extraneous evidence;

and in that case the proceeding was a suit in equity, to set aside the judgment. In all the rest, it was determined on the face of the record, that the service was invalid. In my judgment, where it is sought to contradict the record concerning any jurisdictional matter, it should only be done by a suit in equity, on proper allegation and proof, in which the court, in granting the relief prayed for, may make such conditions in favor of an innocent purchaser, who invested his money on the faith of a record showing jurisdiction in the court, as may be possible and proper.

But a purchaser at a sale on execution, issued on judgment or decree taken by default, where the record does not show jurisdiction in the court over the subject and notice to the defendant, has no equity in the premises as against the true owner. He is the victim of his own folly or negligence.

After a court has acquired jurisdiction by a proper service of process on the defendant, any error in its proceeding cannot be questioned collaterally; but until jurisdiction is acquired, its judgment may be questioned and held for naught in a collateral as well as a direct proceeding.

The only authority cited in favor of the sufficiency of the service in question is *Healey v. Butler*, 66 Wis. 9, in which a similar service of a summons was held good. The return stated that the summons was served on the defendant in Clark County, at his last and usual place of abode therein. The court said the words "last and" were superfluous, and then arbitrarily construed the return, as if it read: "Served the summons at the defendant's 'usual place of abode,' which place of abode was then in Clark County."

Admitting the insufficiency of the return, counsel for the defendants insist that the judgment of the circuit court of Linn County thereon is valid in the courts of this state, and cannot be questioned therein collaterally; and that the judgment of a court of this state, when called in question or attacked in the circuit court of the United States, for this district, must be regarded as a domestic one.

I cannot assent to either of these propositions. As was said by Mr. Justice FIELD in *Galpin v. Page*, 3 Sawy. 107: "Whilst

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the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them." And what faith and credit must be given to the judgment of a state court in the courts of another state, may be seen in *Christmas v. Russell*, 5 Wall. 305, where it is said, such a judgment is neither foreign nor domestic in every sense in said courts, but it is "open to inquiry as to the jurisdiction of the court and notice to the defendant," citing *D'Arcy v. Ketchum*, 11 How. 165; *Webster v. Reid*, 11 How. 437.

Elliott v. Piersoll, 1 Peters, 328, was ejectment brought in the circuit court of the United States for Kentucky. The title of the defendants depended on the validity of an order of a county court of that state, concerning the privy examination of a *femme covert*, who was a party to a deed on which the defendants relied. The court instructed the jury that the order of the county court was void for want of jurisdiction over the subject. On error to the supreme court, the ruling was affirmed. The court, Trimble, J., said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void. . . . The jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

In *Thompson v. Whitman*, 18 Wall. 467, the supreme court, in referring to the opinion of the court in *Christmas v. Russell*, *supra*, in which it is said that the judgment of a state court is "open to inquiry, as to the jurisdiction of the court and notice to the defendant," said: "In a number of cases, in which was questioned the jurisdiction of a court, *whether of the same or another state*, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained

the same general language," citing particularly *Elliott v. Piersoll*, *supra*.

Galpin v. Page, 18 Wall. 350, was a case in which the jurisdiction of a state court was questioned, in an action in a national court, sitting in the same state. (3 Sawy. 93.) The court held that the presumption which the law implies in support of the judgment of a court of general jurisdiction is confined to facts concerning which the record is silent, and limited to the case of persons within their territorial jurisdiction in a proceeding according to the course of the common law.

In *Pennoyer v. Neff*, 5 Otto, 732, Mr. Justice FIELD, speaking of judgments *in personam* in state courts where the defendants had not been personally served with process or voluntarily appeared, said: "The courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the state courts they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them." This seems to be decisive of the question.

In none of these cases, nor any other to which my attention has been attracted, is it said or even suggested that the judgment of a state court cannot be questioned or attacked. collaterally, either for want of jurisdiction of the subject-matter or notice of the proceeding to the defendant in a national court sitting in the same state.

The case of *Owens v. Gotzian*, 4 Dill. 436, is an apparent and may be a partial exception to this statement.

In an action in the United States circuit court for the district of Minnesota, a judgment of a court of the state was given in evidence to defeat the same. The plaintiff then offered to prove that the summons in that case was served by a silent partner of the plaintiffs therein, contrary to the statute, which forbid "a party to the action" to make such service, claiming that this fact made the service invalid and the judgment thereon void.

The court (Nelson, J.) assumed, on the authority of *Thompson*

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v. *Lee*, 22 Iowa, 380, that the judgment of the state court should be regarded as a domestic judgment in that tribunal, but admits that even then "it may be shown void on its face if the court rendering it had no jurisdiction of the defendant's person;" and added: "It is equally true that except for errors affecting the jurisdiction of the court, its validity cannot be questioned."

But this is all that is sought to be done in this case, or that is claimed can be done even if the decree of the state court is not considered a domestic one.

The court also held that the alleged defect in the service of the summons was, at most, only an irregularity, which did not affect the jurisdiction of the court; and finally, that as the alleged silent partner was not named in the proceedings, he was not "a party to the action" within the meaning of the statute, and therefore the service was not only sufficient, but regular.

Assuming, however, that the service, as shown by the record in this case, is invalid, as in my judgment it is, the validity of this decree, according to the ruling in *Odell v. Campbell*, 9 Or. 298, may be questioned even in the state courts.

The opinion in this case, by Mr. Justice Lord, is a clear and able exposition of the law on the subject of acquiring jurisdiction by substituted or constructive service of process. The case was an action to recover real property, and the defendant claimed title under a sale on an execution issued on a judgment against the plaintiff's grantor prior to the conveyance to the latter. The property was attached and an attempt was made to serve a summons on the defendant as a non-resident by publication. The order of publication omitted to direct that a copy of the summons and complaint be mailed to the defendant at his place of residence, nor did it state any reason for such omission, as that such residence was unknown to the plaintiff, and could not with reasonable diligence be ascertained by him. The service was held invalid and the judgment void, for the reason that the court never acquired jurisdiction of the person of the defendant; and that in such a proceeding there is no presumption in favor of the jurisdiction, but the record must show a compliance with the statute in every essential particular. And this rule has been

applied by the courts of the state to a judgment of a national court sitting in this state.

In *Victor v. Davis*, 11 Or. 547, a decree of this court was questioned collaterally, and held for naught, on the alleged ground that the proceeding to acquire jurisdiction of an absent defendant was invalid, on the authority of *Odell v. Baker (Campbell)*, 9 Or. 298.

The suit in which the decree in question was given may be considered as *in personam* and *in rem*. So far as it was sought to enforce the lien of the mortgage on the property included therein, it was in the nature of a suit *in rem* (*Pennoyer v. Neff, supra*, 733); but so far as it was sought to obtain a money judgment against Grigsby it was *in personam*. As to the proceeding *in rem*, it was in the power of the state to provide a substituted service of the summons, in case the defendant could not be found, by delivering it to some person of the family, at his usual place of abode, or otherwise; but as to the judgment *in personam*, nothing short of personal service or a voluntary appearance could authorize that.

In proceeding to enforce the lien of the mortgage by the sale of the property on a substituted service of the summons, the court was not proceeding according to the course of the common law, and there is no presumption in favor of its jurisdiction, or the regularity of the proceedings on which it depends. (*Odell v. Campbell*, 9 Or. 298.)

In conclusion it does not appear from the record that Linn County was Grigsby's "usual place of abode" in the state at the date of the service of the summons on Mary Backus for him, and there is no presumption that it was, and therefore it does not appear that the service or notice required by the statute was had or given, or that the circuit court of Linn County ever acquired jurisdiction to order a sale of the property.

It is not necessary to consider the other objections to the service, nor whether the plaintiff could in this action contradict the return of the sheriff, so as to show that Grigsby, at the date of the service on Mary Backus, had no place of abode in Linn County, or even in the state. The question was argued and submitted upon the understanding that if the court found the return

sufficient, the plaintiff would then, if allowed, offer evidence to contradict it, as suggested. As I have said, my opinion is that the return cannot be contradicted, except in a suit in equity, brought for the purpose of setting aside the judgment thereon.

There must be a finding of fact and law for the plaintiff.

THE UNITED STATES OF AMERICA v. THE STEAMER FRANK SYLVIA, ETC.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

DECEMBER 24, 1888.

1. EXCEPTIONS TO LIBEL.—A steamer provided with a certificate of inspection permitting her to be used as a freight steamer, but not allowing her to carry passengers, is not liable under sections 4465 or 4466 of the Revised Statutes for navigating with passengers on board. But she is liable to the penalty imposed by section 4499 of the Revised Statutes.

Before HOFFMAN, District Judge.

Mr. Milton Andros, for claimants.

Mr. John T. Carey, United States Attorney, on behalf of United States.

HOFFMAN, J. The steamer libeled in this case was provided with a certificate of inspection duly issued according to law.

By the certificate she was permitted to navigate, as a freight steamer, the bay of San Francisco, or its tributaries, for the period of one year; but she was not allowed to carry passengers.

The libel alleges in substance that on November 6, 1887, she took on board and carried four passengers, she being then employed as a freight steamer on a voyage from San Francisco.

There are great, and in my judgment, insuperable difficulties in bringing this offense within the provisions of either section 4465 or section 4466.

The first of these sections forbids the taking on board of any steamer a greater number of passengers than is allowed by the certificate of inspection. Section 4466 provides for special per-

mits to be issued to passenger steamers engaged in excursions, allowing them to take on board an additional number of passengers over and above the number specified in the certificate. No penalty is denounced for carrying passengers on excursions in excess of the number allowed by the certificate and the special permit.

For carrying passengers in excess of the number allowed by the certificate, the master and owner are, by section 4465, made liable to any person suing for the same, to forfeit the amount of the passage money and ten dollars for each passenger beyond the number allowed.

In the case at bar, the certificate licensed the vessel as a freight steamer, and no passengers were allowed to be carried.

The libel is founded on section 4499. This section imposes on the master and owners a penalty of five hundred dollars, for navigating a "steamer" without complying "with the terms of *this title*."

It is argued that the master and owner should have been sued under the provisions of section 4465.

But the steamers referred to in this and nearly every other section of chapter 2, title 52, of the Revised Statutes, are steamers "carrying passengers" or "passenger steamers." They seem to be treated as a class distinct from freight steamers, tugs, towing boats, and yachts.

The certificate issued to a vessel of the former class of steamers, other than a ferry-boat, is required to specify the number of passengers she can prudently and safely carry, and for taking on board a greater number of passengers than is stated in the certificate the penalties imposed by section 4465 are incurred.

But the certificates of inspection granted to a freight-boat, tug-boat, etc., do not specify any number of passengers they may lawfully carry.

The violation of law alleged to have been committed in this case consists in using or navigating a freight-boat for the carrying of passengers without having been inspected as a passenger steamer, or having obtained a certificate specifying the number of passengers she can carry with prudence and safety.

The offense denounced in section 4465 is the taking on board

of such steamer, passengers in excess of the number "stated in the certificate of inspection."

It is plain that she has not committed this offense. If the penalty imposed by section 4465 for a violation of its provisions had been imprisonment of the master, would it be contended that an indictment against him for taking on board passengers in excess of the number *stated* in his certificate, could be sustained upon proof that he had no certificate authorizing him to carry any passengers whatever, and that he, therefore, could not have carried passengers in excess of any number "stated" in the certificate of inspection?

If the language of the section had been "a greater number of passengers than allowed by law," it might with more plausibility have been applied to the facts alleged in this case. But the language is "a greater number of passengers than is *stated in the certificate of inspection.*" It seems clear, therefore, that *some* number must be so *stated* before the number actually carried can be deemed to be in excess of it.

My opinion, therefore, is that the libel is properly brought under section 4499, which subjects to a penalty of five hundred dollars, all steamers "navigated without complying with the terms of this title, for which sum the vessel navigated shall be liable, and may be seized and proceeded against in any district court of the United States having jurisdiction of the offense."

A direct and primary liability of the vessel for the penalty imposed is thus created, and the seizure and proceeding *in rem* is expressly authorized by the statute.

I do not feel called upon, nor hardly at liberty, to consider the very important question raised at the bar as to the constitutional right of Congress to require the inspection of steamers, or in any way regulate the use of vessels employed on the navigable waters of the United States, but not engaged in foreign or interstate commerce.

The validity of the laws regulating the use, equipment, and navigation of vessels used on the navigable waters of the United States, as well as those engaged in foreign or interstate commerce, has long and almost universally been acquiesced in. They are in their object and effect so salutary, and in some particulars

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indispensable to the safety of the foreign and interstate commerce, which Congress has the unquestioned right to regulate, and the effect of a decision adverse to their validity would be so momentous and far-reaching, that I consider it to be my duty as district judge of the United States to assume their constitutionality, and to leave the question of their validity, in whole or in part, under the constitution, to be passed upon by a higher tribunal.

IN RE TERRY.

Circuit Court, Northern District of California.

FEBRUARY 1, 1889.

1. CONTEMPT — PUNISHMENT — COMMUTATION FOR GOOD BEHAVIOR. — One undergoing imprisonment for contempt is not "a prisoner convicted of an offense against the laws of the United States," within the meaning of the act of Congress of March 3, 1875 (1 Supp. Rev. Stats. 184), which allows to such a prisoner, confined "in any prison or penitentiary of any state or territory which has no system of commutations for its own prisoners," a deduction of five days in each calendar month during which no charge of misconduct has been sustained against him.
2. SAME. — Besides, the act is not applicable to one confined in a county jail in California, which state has a system of commutations for its own prisoners, though that system does not allow deductions for prisoners confined in a jail.
3. SAME. — Nor is such prisoner entitled to the credit under the Revised Statutes, United States, section 5544, which provides that "in other cases all prisoners now or hereafter confined in the jails or penitentiaries of any state, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary," as the California commutation act of March 14, 1881, relates only to state prisons, and has no application to prisoners in county jails.
4. SAME. — Even if the California act applied to prisoners in county jails, one imprisoned for the term of six months would not be entitled to a credit, as it provides that one entitled to credit "shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years," etc., and contains no credits for months or fractions of a year.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

Order on W. E. Hale, sheriff, to show cause.

On September 3, 1888, D. S. Terry was adjudged guilty of contempt, and to be imprisoned therefor for the term of six months in the Alameda county jail. (*Ante*, 440; 36 Fed. Rep.

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419.) He claimed credits, and the sheriff declared his intention to allow the credits, and discharge the prisoner on January 31, 1889. This coming to the knowledge of the United States attorney, that officer filed a petition stating the facts, and obtained an order upon the sheriff to show cause why he should not detain the prisoner in custody for the whole term prescribed in the judgment. The facts as stated in the petition being admitted, the question was whether the defendant was entitled to the credits claimed.

Mr. J. T. Carey, United States District Attorney.

Mr. J. C. Martin and *Mr. George W. Reed*, for Sheriff Hale.

By the Court, SAWYER, Circuit Judge. D. S. Terry having been adjudged guilty of contempt, and to be imprisoned therefor, for the term of six months from September 3, 1888, now claims that, in consequence of good behavior, he is entitled to certain credits, which, if allowed, would entitle him to be discharged from further imprisonment. He claims credits under the act of Congress of March 3, 1875 (1 Supp. Rev. Stats. 184), which reads as follows:—

“All prisoners who have been, or shall hereafter be, convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any state or territory which has no system of commutations for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month, during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison penitentiary of such deduction shall be entered on the warrant of commitment.”

The first question that arises is, is Mr. Terry, adjudged guilty of contempt of court, a “prisoner convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction in any prison or penitentiary” of the state, within the meaning of this statute?

It is freely conceded that a contempt is a violation of law, and is of a criminal nature, and that the proceedings to punish for contempt are not civil proceedings, but of a criminal character. But that does not, necessarily, make a contempt an "offense against the laws of the United States," within the meaning of the terms as used in the statute. A contempt is *sui generis*. All courts, independent of statutory provisions, have an inherent power to punish for contempts. Such power is absolutely necessary to their existence, and the effective exercise of their jurisdiction, and the performance of their functions. Bouvier defines "offense": "The doing that which a penal law forbids to be done, or omitting what it commands; in this sense, it is nearly synonymous with crime. In a more confined sense it may be considered as having the same meaning as a misdemeanor, but it differs from it in this, that it is not indictable, but punishable, summarily, by forfeiture of a penalty." It is in the larger sense of a crime, or misdemeanor, defined and expressly made a specific offense by the statute providing a general system of criminal law, indictable, and to be tried, and a conviction had by a jury, that the term is used in this statute. All offenses against the United States are statutory. And the party entitled to credits, is one convicted of an offense against the laws of the United States—that is to say, convicted by a jury upon indictment, or information, of an act that is expressly made an offense by the statute—an offense under the general criminal code, or system of criminal law of the state. If this is not the correct view, then no judgment could be rendered for a contempt, under the constitution, without a trial and conviction by a jury. Article 3, section 2, of the constitution provides, that "the trial of all crimes, except in case of impeachment, shall be by jury." And article 6 of the amendments provides, that:—

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory

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process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

Nobody has ever claimed, so far as we are aware, that a party is entitled to a trial by jury in a proceeding for contempt. In this case, the judgment was rendered, summarily, by the court upon its own observation of what took place before it, and of its own motion, without any witnesses at all, or any indictment, information, or written complaint, and without the aid or intervention of counsel, and the judgment has been sustained by the supreme court. (*Ex parte Terry*, 128 U. S. 289.) Some of the acts performed, it is true, constitute specific offenses against the general criminal statutes of the United States for which the prisoner may yet be indicted, tried, convicted, and punished. And indictments are, in fact, pending for those statutory offenses. Should the prisoner be convicted and imprisoned for those offenses he would, undoubtedly, be entitled to any credits, that might be allowed to parties in his condition, “convicted of an offense against the laws of the United States.” A party may be imprisoned for a contempt until he shall perform some act required by the court, and such imprisonment of a contumacious party might extend through years—even during life. How could any rule of credits be applied to such a case? Yet, if the statute covers any contempt, as being an offense, it must cover all contempts. Summary contempt proceedings are, absolutely, necessary, to enable a court to protect its own dignity, and even preserve its existence; and, to enable it to effectively discharge its proper functions, the proceeding must be at all times under the control of the courts. The proceedings, as before stated, are *sui generis*, especially provided for in separate acts, and are not intended to be included in the ordinary general provisions embraced within the criminal code, or system, with respect to which the party is entitled to all the guaranties provided by the constitution. We are of opinion that the party undergoing imprisonment is not “a prisoner convicted of an offense against the laws of the United States,” within the meaning of the statute allowing credits for good behavior.

2. But if this were an offense against the United States, within the meaning of the act, although we think it is not, the

credits could not be allowed for the following reasons: The act under which the prisoner claims to be entitled to five days' credit for each month—and it is the only act providing for such credits—is wholly inapplicable to this case. The act itself, in terms, limits its application to a "state or territory, which has no system of commutations for its own prisoners." (1 Supp. Rev. Stats. p. 183, sec. 1, 18 Stats. 479.) But the state of California has a "system of commutations for its own prisoners." In *United States v. Schroeder*, 14 Blatchf. 345, the prisoner had been regularly convicted for an offense, and sentenced to be imprisoned for twelve months. After serving his term, less credits claimed under this same act of Congress of 1875, he applied to the court for his discharge, and the court, in deciding the case, said:—

"An examination of the terms of the act of March 3, 1875, shows, that the deduction there provided for can be allowed only to persons confined in a state which has no system of commutations for its own prisoners. The state of New York has a system of commutations for its own prisoners (Laws 1863, ch. 415, and Laws 1864, ch. 321), and, therefore, the deduction of five days per month prescribed by the act of 1875 cannot be allowed. The fact that the state system of commutations does not allow any deduction to prisoners confined in jail does not affect the question. There is still a state system of commutations, and the fact of the existence of such a system, takes the case out of the scope of the act of 1875, without regard to the particular provisions of that system."

We fully concur in this construction of the act. It admits of no other. So California has a system of commutations for its own prisoners. And "the fact of the existence of such a system, also, takes the case out of the scope of the act of 1875, without regard to the particular provisions of the system."

3. The only other provision of an act of Congress under which credits can be properly claimed, is found in section 5544, Revised Statutes, and is as follows:—

"In other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any state for offenses against the United States, shall be entitled to the same rule of credits for

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good behavior applicable to other prisoners in the same jail or penitentiary."

The only system of commutations for the state of California is found in "An act to define, regulate, and govern the state prison of California," passed in 1880, as amended by the act of March 14, 1881. The provisions of that act relate only to state prisons, their officers, and duties, and to the convicts therein confined, their government, discipline, rights, etc. They have no application to county jails, or to prisoners therein confined. The system does not include credits for minor offenders confined for short periods of time in county jails or otherwise. The provisions, therefore, do not reach this case.

4. Again, if the system included prisoners confined in county jails they still fall short of covering the case now in hand. The provision, is, that those entitled to credits "shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of the said term." Now, there are no credits here, at all, for months, or fractions of a year, or of a month, or for days. The shortest term for which any credits are allowed is one year. Mr. Terry was sentenced for six months only. The time is insufficient to entitle him to any credits under the state system. For each and all of these reasons, we are fully satisfied that the prisoner is not entitled to any credits, whatever, and it is so adjudged. And the sheriff of Alameda County is adjudged, and directed, to hold the prisoner in confinement for the full term specified in the judgment for contempt, without any deductions, or credits.

NEUFELD v. NEUFELD.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

FEBRUARY 2, 1889.

1. ATTACHMENT—IN FEDERAL COURTS—INSOLVENCY PROCEEDINGS IN STATE COURT.
—Under Revised Statutes, United States, section 915, entitling plaintiff in a common-law case in a federal court to remedies by attachment or other process similar to those provided by the laws of the state in which the court is held, and requiring similar preliminary proof and security, and section 933, which provides that an attachment shall be dissolved on any contingency on which an attachment would be dissolved in the state courts, proceedings in an action in which an attachment has been levied will be stayed where insolvency proceedings against the debtor are instituted in the state courts, as otherwise the plaintiff would acquire an undue advantage over the state creditors, which is contrary to the intent of the statute.

Before Ross, District Judge.

At law. On petition for stay of proceedings.

Messrs. Graves, O'Melveny & Shankland, for petitioners.*Messrs. Wells, Guthrie & Lee*, for plaintiff.

Ross, J. The plaintiff, Nathan Neufeld, a citizen of the state of Illinois, commenced in this court, on the 31st of December last, an action at law against the defendant, Julius Neufeld, who is a citizen of the state of California, to recover a certain amount of money alleged to be due the plaintiff from defendant, in which action an attachment was duly issued and levied by the marshal on property of the defendant situated in Los Angeles County. A few days after the commencement of the action, to wit, January 7th, the requisite number of the California creditors of the defendant instituted insolvency proceedings against him in one of the superior courts of the state, and, in pursuance of the state statute regulating such matters, the superior court made an order directing, among other things, that no creditor whose debt is provable under the insolvency act of the state be allowed to prosecute to final judgment any action therefor against the alleged insolvent until the question of his discharge shall be finally determined, and that any and all such suits and proceedings be stayed until the further order of the said superior court.

Conceding that such order does not operate to stay or other-

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wise affect the action here, the counsel for the creditors in the insolvency proceedings have, with leave of this court, filed a petition in intervention, in which is set out in full the proceedings had in the insolvency court, and which further shows that the debts and demands of the petitioners, who are residents of the state of California, accrued in said state, for goods sold to defendant, to be employed by him as stock in trade in his business; that the debt upon which the plaintiff's action is based is a debt also provable under the state law by virtue of which the insolvency proceedings are had; and that the defendant has no defense to this action, but will suffer his default herein to be entered, and thereafter judgment to be taken against him. Petitioners therefore ask that this court stay further proceedings for the enforcement of plaintiff's demand, until the state insolvency court shall have adjudicated the question of defendant's alleged insolvency, or until the further order of this court.

At the hearing of the petition the facts upon which it is based were not controverted. As already observed, counsel for petitioners do not dispute the proposition, too well established to require argument, that the right of the plaintiff to prosecute his action in this court having attached prior to the commencement of the insolvency proceedings, that right cannot be arrested, taken away, or impaired by any action of the state court. It is the action of this court that petitioners seek, and that in the interest of justice. It was not the purpose, I think, of the provisions of the Revised Statutes of the United States upon the subject of attachments in common-law causes in the circuit and district courts, to give to the non-resident creditor any unfair advantage over the resident creditor. On the contrary, it seems to me to be plain that the purpose was to give to the non-resident, who might sue in the federal courts, the same rights, but no more, in respect to attachment, as are enjoyed by the resident creditor, who must sue in the state court. And this, I think, is manifest, from the provisions themselves, which are as follows:—

“Sec. 915. In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies by attachment or other process, against the property of the defend-

ant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; *provided*, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other process."

"Sec. 933. An attachment of property upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections [within which the present case does not come], shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state; *provided*, that nothing herein contained shall interfere with any priority of the United States in the payment of debts."

There can be derived from this language of the statute no intent to confer upon the non-resident creditor any other or greater rights than are enjoyed by the resident creditor. It is true that the contingency has not yet occurred in the insolvency proceedings referred to, which, under the state law, would operate a dissolution of all attachments against the alleged insolvent issued out of the state courts, and which, under the express terms of section 933 of the Revised Statutes, would operate to dissolve the attachment issued out of this court; and such contingency may not occur, in which event the plaintiff herein would of course be allowed to proceed to judgment, for the satisfaction of which the property attached would be liable. But by the state law the attachment to which the resident creditors are entitled is subject to be, and as to this defendant has been stayed by the insolvency court pending the insolvency proceedings; and unless a stay of proceedings in this case is granted by this court the plaintiff may, and doubtless will, take judgment ~~against~~ defendant, the manifest effect of which will be to give to the non-resident creditor a remedy by attachment for the enforcement of his demand against the defendant, which is not

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enjoyed by the resident creditors of defendant. And this, in my opinion, is contrary to the intent and meaning of the provisions of the Revised Statutes on the subject. It is ordered that all proceedings in the cause be stayed until the further order of this court.

THE CITY OF SALEM—A. F. REED, LIBELLANT.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 12, 1889.

1. **THE REGULATION OF NAVIGABLE WATERS.**—The power to regulate commerce among the several states comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried, and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the water-way, which regulations are so far applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce.
2. **REGULATION LIMITING THE NUMBER OF PASSENGERS.**—The regulation contained in section 4465 of the Revised Statutes, forbidding a steamboat to carry more passengers than allowed in her certificate of inspection, held to apply to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same state only.
3. **CARRYING PASSENGERS ON STEAMBOATS—PENALTY FOR EXCESS IN NUMBER.**—The regulation contained in section 4465 of the Revised Statutes, forbidding a steamboat to carry more passengers than are authorized by the local inspectors, held applicable to such boat, engaged in carrying passengers on a navigable water of the United States, between ports of the same state only.

Before DEADY, District Judge.

Mr. W. Scott Beebe, for the libellant.

Mr. Charles J. Macdougall, for the defendant.

DEADY, J. This suit is brought by the libellant, A. F. Reed, against the steamboat City of Salem and Robert Thompson, her owner, to recover sundry penalties for carrying more passengers than is allowed by the vessel's certificate of inspection.

An exception is filed to the libel, to the effect that the transportation of passengers in question was wholly within the state, and was therefore not within the grant of power to Congress to regulate commerce nor the jurisdiction of this court.

Section 4399 of the Revised Statutes declares: "Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title" (52); and section 4400 of the same provides: "All steam vessels navigating any of the waters of the United States, which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats . . . for navigating canals, shall be subject to the provisions of this title. (52.)

It is also provided in this title that there shall be an inspector of hulls and one of boilers in each district who shall inspect all steam vessels, and when they "approve a vessel and her equipment" they shall make a certificate to the collector to that effect. (Sec. 4421, Rev. Stats.)

In case of a steamer "carrying passengers, other than ferry-boats, the number of passengers of each class that any such steamer has accommodation for, and can carry with prudence and safety," shall be stated in said certificate (sec. 4466, Rev. Stats.); and if any steamer shall "take on board" any more passengers than the number stated in the certificate of inspection, the owner shall be liable to any person who may sue for the same in the penalty of ten dollars for each such passenger (sec. 4465, Rev. Stats.), and such penalties shall be a lien on the vessel. (Sec. 4469, Rev. Stats.)

It appears from the libel that on July 4, 1888, the City of Salem was a vessel wholly propelled by steam and engaged in navigating the Wallamet River, and was duly enrolled and licensed therefor; that by her certificate of inspection she was only entitled to carry 60 passengers; that on said day this vessel was engaged in carrying passengers from the port of Portland to other points and places on said river and within this district, and did on four such trips carry in the aggregate 2,910 more passengers than allowed by her certificate.

The precise question raised in this case has never been passed on by the supreme court. In the district courts there have been apparently conflicting decisions on the point.

In the *Gretna Green*, 20 Fed. Rep. 901, it was held that a steamboat "regularly enrolled and licensed" for the navigation

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of the Ohio River, "and subject to the laws of Congress," was not liable under section 4492 of the Revised Statutes for carrying passengers in barges in tow, the same not being equipped as prescribed by the supervising inspectors, between different ports of the same state. But the opinion leaves it in doubt whether the steamboat would be liable for carrying passengers on her own decks between the same points, contrary to the laws of the United States on the subject.

After substantially admitting that Congress has the power to prescribe the law of the highway, so far as may be necessary to protect interstate commerce, the court says: "The steamer which had these barges in tow, being subject to the navigation laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio River."

In *United States v. B. & H. C. Ferry Co.* 21 Fed. Rep. 331, it was held that the owners of the vessel engaged in navigating the waters of the Mississippi, carrying passengers between two ports in the state of Iowa, in excess of the number authorized by a permit issued under section 4466 of the Revised Statutes, are liable for the penalties prescribed in section 4500 of the same.

The court held that Congress has power to regulate the navigation of vessels on the navigable waters of the United States, when engaged exclusively in interstate commerce, and that when a steam ferry-boat, contrary to section 4466 of the Revised Statutes, carries passengers between ports of the same state, in excess of the number allowed in her permit, she is guilty of a marine tort, and a district court of the United States has jurisdiction of a suit in admiralty against her owners to recover the penalty prescribed by section 4500 of the Revised Statutes for the same.

In *The Seneca*, 1 Biss. 371, it was held that a steamboat, employed in carrying passengers between two ports of the state of Wisconsin, was not liable to a penalty for not having her hull and boilers inspected under the steamboat act of 1852.

In the case of *The Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763, it was held that three steam vessels belonging to the state of Maryland, not engaged in carrying freight or pas-

sengers, but used to enforce the state fishery laws in the Chesapeake Bay, are liable to the penalties prescribed by section 4499 of the Revised Statutes, for failing to have their hulls and boilers inspected by the United States inspectors, under sections 4417 and 4418 of the Revised Statutes.

The court held that the "supreme and exclusive control" of Congress of the navigable waters of the United States "might be defeated or rendered less effective for its objects, if there were to be recognized a class of vessels privileged to use them, without being subject to those provisions which Congress determines are required for the safety of all. I am therefore unable to assent to the contention that the fact that the vessels in the present case are not used in commerce, but solely for the police purposes of the fishery force, prevents Congress from having the constitutional power to legislate with regard to them. It is not their use, but the fact that they navigate the highways of commerce, which brings them within the constitutional grant of power, and within the language of section 4400 of the act of Congress.

In *Lord v. Steamship Company*, 102 U. S. 541, it was held by the supreme court, in the language of the syllabus, that "while navigating the high seas, between ports of the same state, a vessel of the United States is, together with the business in which she is engaged, subject to the regulative power of Congress."

Mr. Chief Justice Waite, in speaking for the court, said, in substance, that the *Ventura*, while navigating the Pacific Ocean, although bound from and to ports in the state of California, was without the state and on a highway of nations, and therefore "engaged in commerce with foreign nations, and as such, she and the business in which she was engaged were subject to the regulating power of Congress."

This case falls within the language of the statute (secs. 4399, 4400, Rev. Stats.), defining what vessels shall be subject to the provisions of title 52.

The City of Salem is a vessel propelled by steam. On the occasion in question, she was navigating the Wallamet River, a navigable water of the United States (*Hatch v. Wallamet I. B.*

Co. 7 Sawy. 136; Wallamet I. B. Co. v. Hatch, 9 Sawy. 648), which "is a common highway of commerce and open to general and competitive navigation."

Unless the act of Congress, so far as the carriage of the passengers in question is concerned, is unconstitutional, the vessel is liable for the penalties prescribed for carrying more passengers than the law allows.

In my judgment, the solution of this question depends wholly on whether the regulation limiting the number of passengers which a steamboat may carry over a navigable water of the United States, between ports of the same state, is necessary to maintain this highway of foreign and interstate commerce in a safe and desirable condition, for the use of vessels and persons engaged in the same.

The power to make this regulation cannot, in my judgment, be derived from the grant of admiralty jurisdiction. The admiralty jurisdiction of the United States is a part of its judicial power and not its legislative. It extends "to all cases of admiralty and maritime jurisdiction." (U. S. Const. Art. 3, sec. 2.) And while it does not authorize Congress to create admiralty cases, yet if, in the exercise of its power derived from other clauses of the constitution, it should do so, as the power to regulate commerce, the grant of judicial power would extend to them and include them, because in their nature and constituents they would be cases of admiralty and maritime jurisdiction.

Take this case as an illustration. The City of Salem is alleged to have violated a law of the United States, to which a penalty is affixed and made a lien on the vessel. The act was committed on a navigable water of the United States, and the admiralty has jurisdiction of the case—to hear and determine it. But if Congress had not the power to pass the law in question, the suit must fail, because no wrong was in fact committed.

The power to make this regulation must be derived, if at all, from the power granted to Congress "to regulate commerce with foreign nations and among the several states." (U. S. Const. Art. 1, sec. 8.)

In *Gilman v. Philadelphia*, 3 Wall. 724, Mr. Justice Swayne, speaking for the court, said: "The power to regulate commerce

comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States, which are accessible from a state, other than those in which they lie. For this purpose, they are the public property of the nation, and *subject to all the requisite legislation of Congress.*" And in the case of *The Daniel Ball*, 10 Wall. 564, Mr. Justice FIELD, speaking for the court, said the power to regulate commerce "authorizes appropriate legislation for the protection of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient or safe navigation of all navigable waters of the United States, whether that legislation consists in regulating the removal of obstructions to their use, in prescribing the form and size of vessels employed upon them, or in subjecting the vessels to inspection and license in order to insure their proper construction and equipment."

That in the case of steamboats, the inspections of their hulls and boilers, the licensing of their pilots and engineers, the carrying of prescribed lights, and the giving and answering of prearranged signals when meeting and passing, do materially increase the safety and convenience of navigable water, considered as a highway of commerce, there is no doubt, and therefore there is no question that Congress may make regulations on these subjects, which are applicable to vessels engaged in intrastate commerce, as well as foreign or interstate commerce.

The power to regulate the navigation of the waters of the United States being comprehended in the grant of power to regulate commerce, not merely as an incident, but a part of it, Congress has power "to make all laws which shall be necessary and proper for carrying into execution" such power. (U. S. Const. Art. 1, sec. 8.)

In *McCulloch v. Maryland*, 4 Wheat. 421, Chief Justice Marshall said: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution," are constitutional. And again (4 Wheat. 423): "But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into

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the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Upon this exposition of the law is this regulation, limiting the right of steamboats to carry passengers on a navigable water of the United States to the number prescribed by the certificate of inspection of the local inspectors, a necessary and proper regulation of navigation, when such boat is engaged in carrying passengers on such water between different ports of the same state, only?

That it is so, is at least not so apparent, as in the instances mentioned, in which it appears there is no doubt on the subject.

In what particular a boat carrying more passengers than allowed by her certificate of inspection or special permit affects the safety or convenience of the highway has not been suggested by counsel. That the passengers so carried are inconvenienced, and it may be endangered, is likely. But the question is, how is the safety and convenience of the highway thereby unfavorably affected as to other vessels engaged in interstate or foreign commerce thereon? If it was shown that an overloaded boat was more difficult to handle or more likely to become unmanageable or burst her boiler or steam chest, the danger resulting to other vessels on the highway would be apparent. But there is no proof on this subject, and I am not satisfied that it is within the limits of judicial knowledge.

One thing is probable. If a steamboat is allowed to carry passengers between the ports of any state, over the navigable waters of the United States, in excess of the number prescribed in its certificate of inspection, the boats running between said ports, and from or beyond, to ports of another state, will be compelled to do the same thing or substantially abandon what may be called their way business. For any one can understand that a vessel can carry two hundred passengers much cheaper per head than another one of the same character and dimensions can carry half the number for. The result would be to nullify the regulation or make its enforcement difficult in cases where it is admitted to be legal and presumably beneficial.

It may be said that when it is determined that the carrying

of passengers between different ports of the same state is not within the power of Congress to regulate, the state will make proper regulations on the subject. But it is not probable that any state regulation on this subject would be either effective or well enforced.

Congress has expressly declared (secs. 4399, 4400, Rev. Stats.), that this regulation shall apply to steamboats carrying passengers over any part of a navigable water of the United States. The regulation, when applied to the carriage of passengers between ports of the same state, is a beneficial one, and its enforcement tends to the safety of human life. Without it, the excursion boats, which on festive occasions ply between ports of the same state, would often become floating coffins.

If this regulation, as applied to vessels engaged in intrastate commerce, is really calculated to promote the safety and convenience of interstate and foreign commerce, in any appreciable degree, the enactment of it is within the discretion of Congress. And while I am not as clear in my mind on this point as I would like to be, I have an impression that I feel more certainly than I can express, that the regulation in its effect and operation does materially tend to maintain the safety and convenience of this highway of interstate and foreign commerce—the Wallamet River.

On this view of the matter I don't feel warranted, sitting here in the district court, in declaring this act of Congress unconstitutional. It is a proper case to go to the supreme court.

The exception is disallowed.

MAY 14, 1883.

DEADY, J. This suit is brought to recover sundry penalties, alleged to have been incurred by the steamboat City of Salem and her owner, Robert Thompson, in carrying more passengers on the Wallamet River, between Portland and Clinton and McCoy's base-ball grounds, than she was authorized to by law.

The case was before the court on an exception to the libel, to the effect that the transportation of the passengers in question was wholly within the state, and therefore not within the power of Congress to regulate commerce.

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The exception was overruled on the ground that the regulation contained in title 52 of the Revised Statutes, concerning the number of passengers that may be carried on a vessel propelled in whole or in part by steam, while navigating any of the waters of the United States, is applicable to such vessel when engaged in carrying passengers on such water, even between ports of the same state, as a means of maintaining the safety and security of the same, considered as a highway of foreign and interstate commerce. (37 Fed. Rep. 846.)

The case has since been heard on the libel, answer, and testimony, from which it appears,—

That the City of Salem is a steamboat of 456.65 gross tons burden, and on March 6, 1888, was licensed to navigate the Wallamet River for one year, carrying not more than 60 passengers; that on July 4, 1888, she was permitted by the local inspectors to carry an excursion party from Portland to the base-ball grounds aforesaid, a distance of two miles, and return, of not more than 400 in number; and that on said day she did carry on a return trip from said grounds to Portland, not less than 723 passengers, or 323 more than she was authorized to carry.

On the hearing, testimony was introduced by the claimant, to the effect that the overloading of the City of Salem could not and did not, in the opinion of the witnesses, affect the safety or security of the river as a highway for interstate commerce.

However this may be, I adhere to the ruling made on the exception to the libel; that the act of carrying this excess of passengers, being plainly contrary to a regulation of commerce prescribed by Congress, which in the deliberate judgment of that body is necessary to maintain the safety and security of the river, as a highway of interstate commerce, will not be held legal by me, sitting in this court, on the ground of unconstitutionality of the regulation.

Since writing the opinion on the exception to the libel, I have been favored with the opinion of Mr. Justice HOFFMAN in the case of the *United States v. The Frank Sylvia*, 37 Fed. Rep. 155. So far as this question is concerned, the case is on all fours with this. In disposing of it, this able and experienced jurist said:—

Points decided.

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"I do not feel called upon, nor hardly at liberty, to consider the very important question raised at the bar, as to the constitutional right of Congress to require the inspection of steamers, or in any way regulate the use of vessels employed on the navigable waters of the United States, but not engaged in foreign or interstate commerce. The validity of the laws regulating the use, equipment, and navigation of vessels on the navigable waters of the United States, as well as those engaged in foreign or interstate commerce, has long and almost universally been acquiesced in. They are, in their object and effect, salutary, and, in some particulars indispensable, to the safety of the foreign and interstate commerce, which Congress has the unquestioned right to regulate, and the effect of a decision adverse to their validity would be so momentous and far-reaching, that I consider it to be my duty, as district judge of the United States, to assume their constitutionality, and to leave the question of their validity, in whole or in part, under the constitution, to be passed upon by a higher tribunal."

The finding of the court will be that penalties amounting in the aggregate to the sum of \$3,230 have been incurred by the owner of said steamboat, for the causes stated in the libel herein, as amended, which, together with the costs of this suit, are a lien thereon, from the date hereof; and unless paid within ten days execution may issue to collect the same.

FREEMAN v. THE UNDAUNTED.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

FEBRUARY 15, 1889.

1. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — PILOTS — HALF PILOTAGE. — The Political Code of California, section 2466, imposes half pilotage on vessels when a pilot is declined, but section 2468 exempts "from all charges for pilotage, unless a pilot be actually employed, all vessels coasting between San Francisco and any port in Oregon, or in Washington or Alaska territories, and all vessels coasting between the ports of this state." The Revised Statutes of the United States, section 4237, provide that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage, or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states." *Held*, that the California statute is void for unlawful discrimination, and half pilotage cannot be collected under it.

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Opinion of the Court—Sawyer, C. J.

Before SAWYER, Circuit Judge.

In admiralty. Appeal from the district court.

Libel by E. M. Freeman against the ship Undaunted, for half pilotage. The district court dismissed the libel and libellant appeals.

Mr. P. G. Wigginton, for appellant.

Mr. Milton Andros, for appellee.

SAWYER, Circuit Judge. This is a suit for half pilotage, the captain of the Undaunted, a registered American vessel, having refused to employ a pilot when leaving the port of San Francisco for the port of New York.

The only question, is, whether the statute of California, allowing half pilotage, is not in conflict with the statute of the United States upon the subject, and, therefore, void. Under section 2466 of the Political Code of California, vessels of her class are required to pay "five dollars per foot draft, and four cents per ton for each and every ton registered measurement," and half pilotage when a pilot is declined. But section 2468 "exempts from all charges for pilotage, unless a pilot be actually employed, all vessels coasting between San Francisco and any port in Oregon, or in Washington or Alaska territories, and all vessels coasting between the ports of this state," thereby excepting them from the operation of the general provision of section 2466. Thus by the express provisions of the state statute, a discrimination is made between "vessels coasting between San Francisco and any port of Oregon, or in Washington or Alaska territories, and all vessels coasting between the ports of this state," and "vessels sailing between the ports" of California and any of the other states of the Union—the discrimination being against all the last-named vessels, the latter being required to pay half pilotage, when they decline the services of a pilot, while the former are wholly exempt from half pilotage under the same circumstances and conditions. But section 4237 of the Revised Statutes of the United States provides, that "no regulations, or provisions shall be adopted by any state, which shall

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make any discrimination in the rate of pilotage, or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states . . . and all existing regulations or provisions making any such discrimination are annulled and abrogated." Thus, this express provision of the statute, renders void the statute of California cited. It is claimed, however, that as this vessel sails around Cape Horn to New York, and may touch at some foreign port on the way, it is not "coasting" between the two ports of San Francisco and New York. But, if this be so, the provision of the Revised Statutes cited, does not say "coasting," but "vessels sailing" between the ports of the states. This vessel is, clearly, within the terms of the provision. The provision is constitutional and valid under the clause of the national constitution authorizing Congress to regulate commerce between the states. The case of *Sprague v. Thompson*, 118 U. S. 90, is in point, and covers this case. The ship *Undaunted*, therefore, is not liable for half pilotage, and the decree of the district court must be affirmed, and the libel dismissed, and it is so ordered.

SWAYNE v. HAGER, COLLECTOR.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

FEBRUARY 25, 1889.

1. CUSTOMS DUTIES — CLASSIFICATION — CHINESE SHOES. — Chinese shoes, consisting of an upper part of cotton or silk, and a sole of felt and leather, the felt being made from hair mixed with wool-fiber and paper, stiffened with rice starch, are not taxable under the act of 1883 (schedule K, par. 14), imposing forty cents per pound, and thirty-five per cent *ad valorem* on clothing, ready made, and wearing apparel, not enumerated, composed wholly or in part of wool, worsted, alpaca, or other hair, made up by the tailor, seamstress, or manufacturer, but as non-enumerated articles at the highest rates at which their component material of chief value may be chargeable. The cotton shoes, therefore, fall under schedule I, paragraph 7, imposing thirty-five per cent *ad valorem* on manufactures of cotton not specially provided for, and the silk ones under the last paragraph of schedule L, imposing fifty per cent *ad valorem* on goods not specially enumerated, made of silk, or of which silk is the component material of chief value.
2. A DEFINITION ADOPTED AND AOTED UPON for a long time should not be regarded as changed by a subsequent act of Congress, unless an intention to change is clearly manifest.

Before SAWYER, Circuit Judge.

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Opinion of the Court—Sawyer, C. J.

At law. Action by R. H. Swayne against John S. Hager, collector of customs, to recover an excess of duties paid by him.

Mr. Milton Andros and Messrs. Page & Eells, for plaintiff.

Mr. J. T. Carey, United States Attorney, for defendant.

SAWYER, Circuit Judge. This is an action brought to recover \$3,799.50, with interest, for what is claimed to be an excess of duties over the amount required to be paid by law, collected upon various invoices of Chinese shoes, imported at the port of San Francisco. The shoe consists of the upper part made of silk or cotton, which constitutes the most valuable part of the material, and the sole, the upper part of which is composed of layers of felt and the bottom part of leather. The felt is manufactured in thin sheets from the hair of various animals, as dogs, cattle, and goats, intermixed with wool-fiber and paper. A glue, or starch, made from rice, is added to give greater cohesion. Layers of this article are placed together, and the whole pressed into large sheets, which are then sold to manufacturers for the purpose of making shoes. Several thicknesses of these attached to the silk, or cotton uppers, with a leather bottom piece, constitute the sole of the shoe. The question, is, under what provision of the statute should duties on these Chinese shoes be levied and collected? Under, then, recent instructions from the treasury department they were classified, and duties thereon collected under the fourteenth paragraph of schedule K, of the act of March 3, 1883 (22 Stats. 508), which reads as follows:—

“Clothing, ready made, and wearing apparel of every description, not especially enumerated or provided for in this act, and balmoral skirts, and skirting, and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, except knit goods, forty cents per pound, and in addition thereto, thirty-five per centum *ad valorem*.”

The importer claims that inasmuch as the goods are non-enumerated articles, “manufactured of two or more materials,” the duties should have been assessed “at the highest rates at

which the component material of chief value may be chargeable," under section 2499 of the Revised Statutes, as amended by the act of March 3, 1883 (22 Stats. 491). The clause of said section, under which it is claimed that the goods should be classified, reads as follows:—

"And on all [non-enumerated] articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates, provided that non-enumerated articles, similar in material and quality and texture, and the use to which they may be applied to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

Under this statute, the importer further claims that the cotton shoes—the cotton being the most valuable part of the material—should be assessed under paragraph 7 of schedule I of the act of 1883, as "manufactures of cotton not specially enumerated or provided for." The provision is as follows:—

"Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton not specially enumerated or provided for in this act, and corsets, of whatever material composed, thirty-five per centum *ad valorem*." (22 Stats. 506.)

And on the silk shoes, in like manner, duties should be levied under the last paragraph of schedule L, as a non-enumerated article made of silk, or of which silk is the "component material of chief value." The paragraph reads as follows:—

"All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per cent *ad valorem*." (22 Stats. 510.)

After a careful examination of these provisions of the statute, and the rules of construction of revenue laws laid down by the United States supreme court in the cases cited on behalf of the plaintiff, I am satisfied that the treasury department is wrong, and the complainant right, in their respective constructions of the statute. I do not think the shoes in question are "com-

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posed wholly or in part of hair," within the meaning of the statute. The component parts of the shoes are cotton, or silk, felt, and leather. These are the parts as used by the manufacturers of shoes. It is true that hair is one of the elements used in the manufacture of felt. But I do not think Congress intended, by this classification, to include all the ultimate elements that may have entered into an article. Such a classification would be too nice for practicable purposes. I think, also, the statute refers to textile fabrics. For rules of construction on this point see *Elliot v. Swartwort*, 10 Peters, 137, 151; *Arthur v. Morrison*, 96 U. S. 110; *Cohn v. Seeberger*, 30 Fed. Rep. 425; *Greenleaf v. Worthington*, 26 Fed. Rep. 303; *Riggs v. Frick*, Taney, 100. So, also, in my opinion, shoes were not intended to be included in the terms, "wearing apparel of every description," in the provision cited from schedule K. By reading it with the context, "wearing apparel . . . made up or manufactured wholly, or in part, by the tailor, seamstress, or manufacturer," it seems evident that Congress intended other manufacturers of a class similar to a "tailor, or seamstress" — "something *ejusdem generis*." The principle *noscitur a sociis* appears to me to be applicable. A shoemaker is not in any respect similar to a tailor, or seamstress. In ordinary popular use of language, no one, I presume, would for a moment think that shoes are included in the terms "wearing apparel." See the following decisions supporting and illustrating the construction adopted: *Oates v. National Bank*, 100 U. S. 239, 244; *Bend v. Hoyt*, 13 Peters, 263, 270–272; *Adam v. Bancroft*, 3 Sum. 384, 386; *Reiche v. Smythe*, 13 Wall. 162. Chinese shoes have been imported for more than twenty years, and it is understood that during all the time, and for three years after the passage of the act in question, they have been classified as manufacturers of silk and cotton respectively. A definition adopted and acted upon for a long time should not be regarded as changed by a subsequent act of Congress, unless the intention to change is clearly manifest. (*Reiche v. Smythe*, 13 Wall. 162; *De Forest v. Lawrence*, 13 How. 274. See, also, *Edwards v. Darby*, 12 Wheat. 210; *Hahn v. United States*, 107 U. S. 402, 406; *United States v. Pugh*, 99 U. S. 269; *Robertson v. Downing*, 127 U. S. 608,

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613, and cases therein cited.) I think the classification should be made, and duties levied under the several provisions cited as claimed by the importer. Let there be findings and judgment accordingly.

EDWARD TRACY v. MARY A. REED.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 4, 1889.

1. **ASSESSMENT OF REAL PROPERTY—TO WHOM MADE.**—By the act of 1882 (Comp. 1887, sec. 2735), real property must be assessed to the owner thereof, unless it is unoccupied and the owner unknown; and an assessment made to a person not the owner of the property is invalid.
2. **"OWNER" OF PROPERTY—WHO IS.**—The owner of property for the purpose of taxation is the person having the legal title or estate thereto or therein, and not one who by contract or otherwise has a mere equity therein, or a right to compel a conveyance of such legal title or estate to himself.
3. **TAX DEED—EFFECT OF.**—An act of the legislature (Comp. 1874, p. 767, sec. 90) made a tax deed conclusive evidence of the regularity of the assessment, except for fraud; and on the trial of an action brought by the grantee in such a deed, to recover possession of the premises mentioned therein, the parties stipulated the existence of certain facts, from which it appeared in the judgment of the court that the assessment in question was made to a person not then the owner of the property. *Held*, that the effect of such stipulation was a waiver by the plaintiff of the conclusive character of the deed in this respect, and an admission that if in the judgment of the court the person to whom the property was assessed was not the true owner thereof, then the assessment was invalid and the tax deed void.
4. **IDEM—ACT CHANGING EFFECT OF.**—A tax deed made in pursuance of a sale of property for a delinquent tax, under an act which provided that such deed shall be conclusive evidence of the regularity of the assessment, except for fraud, is a contract with the state that the deed shall so far remain conclusive evidence of title in the grantee therein, and a subsequent act of the legislature, making such deed only *prima facie* evidence of such regularity, is void, because it impairs the obligation of the contract. The ruling in *Marz v. Hanthorn*, 12 Sawy. 377, on this point affirmed.

Before DEADY, District Judge.

Mr. W. Scott Beebe and Mr. John M. Gearin, for the plaintiff.*Mr. Alfred Sears and Mr. Paul R. Deady*, for the defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to recover the possession of lot 3, in block 206, of the Couch addition to Portland.

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The pleadings consist of the complaint, answer, and reply, from which it appears that the plaintiff claims title to the lot under a sale thereof for a delinquent tax thereon, on June 18, 1884, to which claim two defenses are pleaded: (1) The assessment on which said tax was levied is void, because not made to the owner of the property; and (2) the tax was paid before the sale took place. The defendant also brings into court, and deposits with the clerk, under section 2323 (Comp. 1887), the sum of \$15.65, the same being the amount of the tax of 1883, and the accruing cost and interest thereon.

The case was submitted to the court for trial without the intervention of a jury, and upon a stipulation concerning certain facts, with the right to either party to introduce further evidence on the trial.

From this stipulation it appears that the property in question exceeds in value the sum of \$2,000, and that on July 10, 1880, R. Glisan being the owner thereof, bargained and sold the same to the defendant by an agreement of that date, signed by himself and wife, and by the defendant.

By the terms of this agreement, erroneously called "a bond for a deed," the defendant was to pay \$300 for the property—the one half down, and remainder in quarterly payments of \$18.75 each, with interest; whereupon the vendors were to convey the premises to her in fee-simple. It was also agreed that the defendant might take possession of the premises at once, and that she would pay all taxes that might be levied on the property; and that if the purchase money due under the agreement was not all paid by July 10, 1882, the agreement should become null and void at the option of Glisan, and all money then paid thereon become forfeited to the vendors.

On September 14, 1881, the defendant paid the remainder of the purchase money, and on June 7, 1887, the vendors duly conveyed the premises to her.

Prior to July, 10, 1880, the property was assessed to R. Glisan as the owner thereof, but after the making of said agreement and for and during the years 1880 to 1887, both inclusive, the same was assessed to the defendant without complaint or objection from any one. It is admitted that during the same period,

except for the year 1883, the defendant paid the taxes levied on the property in pursuance of said assessments, and she claims to have paid it for that year also.

On May 17, 1884, the sheriff of Multnomah County, in pursuance of a warrant from the county court thereof, levied on the premises, as the property of the defendant, for the purpose of collecting the tax levied thereon in 1883, alleged to be then delinquent, and amounting to \$3.90, notice of which levy and the sale thereon was duly published in the Daily Oregonian on May 19, 1884; and on June 18, 1884, the property was offered for sale and bid in by the plaintiff for the sum of \$6.47, and no redemption being made thereof, on June 6, 1887, he received a deed from the sheriff therefor.

In December, 1884, the defendant took possession of the premises and moved into a house thereon, which she commenced to build on the 4th of July previous, in which she has ever since resided.

The defendant testifies that she can neither read nor write; that in the spring of 1884 her daughter, Mrs. Belle Reed, came to her house with a newspaper in her hand and called her attention to the fact that her lot was advertised for sale for a delinquent tax, and that she and her daughter went the same day to the sheriff's office and paid the tax to the deputy, A. W. Withereff, then in attendance there, but whether she got a receipt or not she is not certain, and if she did she says it is lost or mislaid. In this statement she is corroborated throughout by her daughter. James Sheridan, who was boarding with the defendant in the spring of 1884, testifies that he heard the conversation between the daughter and the mother concerning the property being advertised for sale and saw them go out of the house later in the same day, saying they were going to the sheriff's office to pay the tax.

The deputy testified that he has no remembrance of the tax being paid, that there is no stub in the receipt book showing the payment of the tax, as there should be, if it was paid, and he is therefore quite confident it was never paid.

The defendant and her daughter both state that a Mrs. Ann Keating, with whom the latter was living at the time, accom-

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panied her to the house of the defendant, to inform her that the tax was delinquent, and then went with them to the sheriff's office and saw the same paid. The deposition of Keating was read by the plaintiff, in which she denies this story, so far as she is concerned, *in toto*. But Sheridan testified that a woman, not known to him, came to the house on this occasion with the daughter, and afterwards left the house with her and the defendant, when the latter said she was going to pay the tax.

The testimony of the deputy, Witherell, that the tax was not paid, because he does not remember it, and because there is no stub to that effect in the receipt book, is, in effect, but little more than the legal presumption that he did his duty in the premises; that is, if the tax was paid, he gave the party a receipt therefor, and made a corresponding entry on the stub thereof. (Comp. 1887, sec. 766, subd. 15; 2 Wharton on Evidence, secs. 1318, 1319.)

The statute (Comp. 1887, sec. 2801) makes it the duty of the sheriff on "the receipt of money for taxes" to give a receipt therefor; and contains a form of the stub thereof, which he keeps in his office, and the particulars to be entered thereon.

The direct affirmative testimony of one altogether creditable witness to the fact of payment of taxes ought to be sufficient to overcome this presumption. But the defendant is pecuniarily interested in the result, and the daughter is as likely to be influenced by the fact as her mother.

I fear it would in some, if not many instances, make tax titles a delusion and a snare, if they could be avoided by the mere oath of the delinquent or his immediate relatives or prospective heirs, that the taxes had been paid without taking a receipt therefor.

And the fact that no receipt was taken by the defendant for the payment of this tax is a circumstance of some weight against the statement that the same was paid. The officer would naturally give the defendant a receipt, and she would most naturally, if necessary, demand one.

The testimony of Mrs. Keating does not contradict the testimony of the defendant and her daughter as to the payment of the tax, but only a collateral circumstance of the transaction, as related by them, namely, her presence at such payment.

But, notwithstanding Keating's testimony, the defendant may have paid the tax, and what is more, her testimony may not be true. It is not apparent what object the defendant could have in falsely connecting her with the transaction. Her memory may be at fault with reference to the person who came to the house with her daughter and went with them to the sheriff's office. For Sheridan, who seems to be a disinterested and fair witness, says that some woman came to the house with the daughter on the occasion in question, and went with the parties when they left the house.

I was certainly impressed on the trial with the apparent fairness and candor of the defendant and her daughter as witnesses; and it does not seem probable that the former would, even if she had allowed this property to go to sale for the paltry sum of this tax, have taken no steps to redeem the same, within the two years allowed by law—or would have continued to pay the taxes on the property in the mean time. I can but think she was at least laboring under the impression that the tax of 1883 was paid. The property was her home, and probably all she had of any value in the world, and it seems improbable that she would consciously sacrifice it for the paltry sum of \$3.90.

And yet I do not feel satisfied, under the circumstances, to find, as a matter of fact, that this tax was paid by the defendant. This leads to the consideration of the question—was there any valid assessment of this property preparatory to the levy of this tax?

Section 2735 of the Comp. of 1887 (sec. 2 of the act of October 26, 1882), provides: "All lands shall be assessed and taxed in the county where the same shall lie, and every person shall be assessed in the county where he resides when the assessment is made, for all real and personal property then owned by him within such county; an unoccupied land, if the owner is unknown, may be assessed as such, without inserting the name of any owner."

By this act, the rule prescribed in section 6 of the act of 1854 (Comp. 1874, p. 750, sec. 7), which allowed "land owned by one person and occupied by another," to be assessed in the name of either, was changed. In the act of 1882, sometimes called

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"the mortgage tax law," the provision allowing an assessment to be made in the name of a mere occupant was omitted for some reason, and now and since then, land is required to be assessed to the owner, unless it is unoccupied, in which case it may be assessed, as such, without naming the owner.

When a person is assessed "for" real property, as being "owned" by him, he must be designated on the assessment roll as the owner of the same. It is not sufficient to assess or value the land for taxation generally. It must be assessed or valued, as the land of the owner thereof and not another. (Cooley on Taxation, 278.)

In *Marx v. Hanthorn*, 12 Sawy. 365, this court held that where the statute requires property to be assessed in the name of or to the owner, the name is a part of the description of the premises; and I may add is a material part of the transaction.

It may be, that the action of the assessor in assessing unoccupied land to an unknown owner cannot be attacked in a proceeding like this, except for fraud. But the ownership of this land was known. It had been assessed to R. Glisan prior to 1880, as the owner thereof, and so far as appeared of record, he was still such owner. Nor is it claimed that the owner was unknown.

Was that ownership changed prior to 1883, when this assessment of the property was made to the defendant? The legal title and estate was still in Glisan. By virtue of the agreement of sale and the payment of the purchase price, the defendant had an equity, as against Glisan or any one who might take the legal title from him, with a knowledge of the facts, to have a conveyance of the property made to her—to have a specific performance of the contract of sale. But the property was not "owned" by her in the legal acceptance of the phrase, until the conveyance was made to her in 1887. Nor is the fact that she agreed in the mean time to pay the taxes material. This was a mere private arrangement between the vendors and vendee of which the law took no cognizance. A lessee of property might agree to pay the taxes thereon, but that would not make him the owner of the property for the purpose of taxation or otherwise.

Nor is it material that the defendant paid the taxes on the

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property after the sale to her. She did so, not because the state had any legal claim upon her for such taxes, but in pursuance of her contract with her vendors, to that effect. And in so doing, so far as the state was concerned, she was acting as the agent of such vendors. Nor was she bound to object to the assessment of the property in her name, if she was ever aware of it. It was not her duty to instruct the assessor to whom to assess the property; and it is not claimed that she ever returned it for assessment as her own. And finally, no one was prejudiced by her silence or acquiescence. (Cooley on Taxation, 573.)

It is true that the term "owner" is sometimes used in a large and comprehensive sense, or at least is so construed. For instance, where it is used to designate the person who may redeem property sold for taxes or upon execution, it may be and is construed in the interest of justice and convenience to include the holder of an equity, or what is sometimes called the owner of the "equitable estate."

In *Dubois v. Hepburn*, 10 Peters, 22, the supreme court held that a statute of Pennsylvania, which gave the "owner" or "owners" of land sold for taxes the right to redeem the same, included an owner of an undivided part of the property, so that he might redeem the whole tract. In the course of his opinion, Mr. Justice Baldwin said such a law ought "to receive a liberal and benign construction;" nor should the right to redeem be "narrowed down by a strict construction." And continuing he said: "Any right which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem."

But the owner spoken of in the statute relating to assessment of land for taxation is the legal owner, the one having the *jus disponendi* or the right of disposal. The statute declares that a sheriff's deed to a purchaser at a tax sale shall pass the "legal title" to the premises, thereby necessarily implying that if the land is not assessed to owners unknown, it must be assessed in the name of the person in whom such title is vested at the time. The record of deeds is *prima facie* the proper evidence of owner-

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ship for the purpose of taxation; and the statute should have limited the word "owner" to the last vendee of record.

In *Washington v. Pratt*, 8 Wheat. 681, it was held that a statute authorizing a sale of lots in Washington City for delinquent taxes, on a notice varying in length according to the residence of the parties, whether within the District of Columbia, or without the United States, to whom "the property belongs," which notice, among other things, was required to contain "the name of the person or persons to whom the same may have been assessed," did not authorize the sale of a lot to any one but the "actual" owner.

In *Davis v. Cincinnati*, 36 Ohio, 27, it was held that where a statute made an assessment on a lot for street improvements, a debt or demand that could be enforced against the "owner" thereof in a personal action, that such action could not be maintained against a lessee of the property; and that no one was the "owner" of the same, within the meaning of the statute, who had less than a freehold interest therein.

In reply to the suggestion of counsel, that the assessment of this property is a proceeding *in rem*, and that the name in or to which it is entered on the assessment roll is a matter non-essential, attention is called to the cases of *Dowell v. Portland*, 13 Or. 248, and *Hawthorne v. East Portland*, 13 Or. 271. Both cases were assessments for improving streets, and the statutes under which they were made, required that they should be entered in a record called the "Docket of City Liens," in the name of the owner of the property. In the first case the name of the father of the owner was used, and in the second one the property was assessed to the estate of a deceased person. The court held the assessments void, because they were not entered in the docket in the name of the true owner.

The warrant for the collection of a delinquent tax requires the sheriff to make the tax out of the personal property of the delinquent. (Comp. 1887, sec. 2814.) But how can this command be obeyed unless the assessment is made to the owner of the property. So far, the tax is a personal charge, to be enforced by the sale of the owner's goods and chattels, if any be found. If the real property of A may be assessed to B, then the per-

sonal property of B may be taken and sold to pay the tax on the real property of A, which could never have been the intention of the legislature.

Something remains to be said concerning the legal effect of the sheriff's deed to the plaintiff.

By the law in force when this sale was made such deed was *prima facie* evidence of the regularity of the prior proceedings, which presumption could not, as to the assessment, be overcome, except by proof that the same was fraudulent. (Comp. 1874, p. 757, sec. 90.) An assessment cannot be considered fraudulent, simply because, so far as appears, the assessor has ignorantly or carelessly assessed the property to the wrong person as owner. (*Marx v. Hanthorn*, 12 Sawy. 374.)

The legislature may make a tax deed conclusive evidence of the regularity of all such prior proceedings as are mere matters of expediency—acts which might have been dispensed with in the first place. And in my judgment the entry of property on the assessment roll in or to the name of the owner is one of them. (*Marx v. Hanthorn*, *supra*, 374, 375.)

It follows from these premises, that when the state sold this lot to the plaintiff, it contracted with him that the legal effect of his deed should not be changed or overcome by proof that the property was assessed, without fraud, to the wrong person as owner.

The act of February 21, 1887 (Comp. 1887, sec. 2823), makes the sheriff's deed *prima facie* evidence only of the regularity of the prior proceedings, and therefore it may be overcome by proof to the contrary in any respect—as that the property was assessed, without fraud, in the name of a person who was not the true owner. In this respect, the act of 1887, if held applicable to the plaintiff's deed, would change its legal effect as a muniment of title, and so far impair the obligation of the contract with him, contrary to the constitution of the United States. (*Marx v. Hanthorn*, *supra*, 376.) Nor is it material that the deed was not executed until after the passage of the act of 1887. The contract of the state with the plaintiff arose out of the circumstances of the sale, and the law then in force, and applicable to the transaction.

I am aware that the majority of the supreme court of the state, in *Strode v. Washer*, 17 Or. 50, since the decision of this court in *Marx v. Hanthorn*, *supra*, but apparently without being aware of it, have decided this question otherwise. But the question is a federal one, and the national instead of the local courts give the law on the subject. I admit that there is no question but that the legislature may shift the burden of proof between the purchaser and the delinquent tax-payer. But this is not that case. The section 90, *supra*, closed the door against all further proof, and said in effect that no evidence should ever be received to impair the legal effect or operation of the deed in this respect.

A deed given by the state on such a legislative assurance is a contract, a warranty against the existence of any such defect in the prior proceedings, which the state cannot vary or impair.

But by the voluntary stipulation of the parties it is admitted that certain facts exist which, in the judgment of the court, show that the property was not assessed to the true owner, and that therefore the assessment is invalid. The plaintiff thereby waives the conclusive effect of his deed in this respect, and practically admits that if, upon the facts stated, the defendant was not, in the judgment of the court, the owner of the property within the purview of the tax law, the assessment was invalid and his deed void.

A finding of fact will be filed to the effect that the tax was not paid by the defendant, and that the assessment was made to the defendant as owner, when R. Glisan was the true owner, and of law, that the defendant is entitled to the possession of the premises and a judgment in bar of the action and for costs.

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NEWBERRY v. BENNETT ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MARCH 26, 1889.

1. **SALE—WARRANTY—EVIDENCE.**—Plaintiff testified that in the negotiations for the sale of a horse worth \$3,000, which he desired for breeding purposes, it was agreed that the warranty sued on, which was that the horse was a reasonably sure foal-getter, should be given, and at the close of them, plaintiff executed deeds for the land which was exchanged for the horse, and that defendant at the same time executed the bill of sale of the same date containing the warranty. Defendant testified that he never agreed to give the warranty, and did not give the bill of sale and warranty at the time of the completion of the sale, but that several days after, plaintiff asked for a bill of sale as a favor, and to accommodate him defendant made the bill of sale, using a blank therefor, and not noticing that it contained the warranty; that he had two forms of bills of sale, one of which contained a warranty and the other did not, and that he inadvertently used the former. Defendant was in the habit of giving a bill of sale and warranty for horses sold. *Aid*, that the evidence showed the execution of the bill of sale and warranty at the time of the sale.
2. **SAME—DAMAGES.**—Defendant having agreed to replace the horse on delivery of it to him in case it should prove barren, and ample evidence of its unsuitness for breeding purposes having been given in the three months following the purchase, plaintiff should have then returned it, and cannot recover expenses incurred upon it after that time.

Before Ross, District Judge.

At law.

Messrs. Curtis & Otis, for plaintiff.*Mr. Lucien Shaw* and *Mr. W. T. Williams*, for defendants.

ROSS, J. This action is founded upon a guaranty contained in a bill of sale executed by defendants to the plaintiff for a Clydesdale stallion called "Scotland's King," which reads as follows:—

"We hereby guaranty the above-named horse to be a reasonably sure foal-getter, with proper care and handling. In case he should prove barren we agree to replace him with another horse of the same breed and price, upon delivery to us of above-named horse, if as sound and in as good condition as when purchased of us."

While the bill of sale expresses a consideration of \$3,000, it appears from the evidence in the case that the horse was in fact transferred to the plaintiff in exchange for two pieces of land,

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one situated in the state of Minnesota and the other in Dakota, conveyed by plaintiff to the defendants. That the horse did not prove a reasonably sure foal-getter or any foal-getter at all, is, from the evidence, very clear. It is claimed for the defendants that he did not receive from plaintiff proper care and handling, and that the fact that he would take no notice of mares was occasioned by such neglect. I do not think that a fair deduction from the testimony. The plaintiff caused a good stable to be built for the horse, and had an experienced man constantly employed in charge of him. He was well groomed, and, although not fed upon some of the food mentioned by some of the witnesses for defendants as being best for stallions, he was given an abundance of the food commonly fed in this country, and upon which other stallions of the same breed do well here, as stated by a witness for the plaintiff, and upon which this particular horse kept in good flesh. I am satisfied from the evidence that the defect in the horse cannot be attributed to a want of proper care or handling on plaintiff's part. Proving barren, the horse was returned by the plaintiff and tendered to defendants, with a demand that they replace him with another horse of the same breed and price. Defendants refused to receive the horse, or to comply with the demand, claiming: *First*, that they gave no guaranty; and, *secondly*, that the horse was not then as sound and in as good condition as when purchased by the plaintiff. I think the evidence shows that he was in substantially the same condition when returned as when purchased.

But the first objection made by defendants to the tender goes to the principal point relied upon in defense of the action. It is claimed by defendants that the guaranty was not executed at the time of the sale, but subsequently, and without consideration; and upon this point the testimony of the plaintiff and of the defendant Bennett is in direct conflict. Both of these parties made a good appearance upon the witness stand, and were apparently testifying truthfully. Yet the testimony of both cannot be true. In brief, that of the plaintiff on this point is that in the negotiation concerning the horse the agreement with defendants was that they should give the guaranty in ques-

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tion, and that at the time of the closing of the trade plaintiff executed to defendants deeds for the land, and at the same time the elder Bennett (with whom the business was conducted) executed to him (plaintiff) the bill of sale and guaranty. Bennett positively denies the statement of the plaintiff in these particulars, and testifies that he never agreed to give a guaranty, and did not give a bill of sale or guaranty at the time of the consummation of the sale; that several days after its consummation and after his receipt of the deeds in payment for the horse, plaintiff came to him, and asked him as a favor to give him a bill of sale for the horse, and that to accommodate plaintiff he (Bennett) went to his room, and got a blank bill of sale and signed it, not noticing that it contained a guaranty, and gave it to the plaintiff; that defendants, whose business is that of importing and selling stallions, have two forms of bills of sale, one with and the other without a guaranty, and that in this instance a blank with the guaranty was used through inadvertence. In deciding upon such conflicting testimony of witnesses apparently truthful the court must look at the probabilities of the case. In the first place, it is not probable that the plaintiff would have asked as a favor that which he had the right to demand as a right. In the next place, the purpose for which the plaintiff wanted the horse was that of breeding. It was reasonable and probable, therefore, especially in view of the fact that the horse was a costly one, that plaintiff should require a guaranty that he should prove a reasonably sure foal-getter, if defendants would give such guaranty; and that they were in the habit of giving such guaranties in cases of sale was admitted by the witness, Bennett. This witness also admitted that he usually executed a bill of sale for the horses that he sold. It would therefore have been unusual for him not to have executed such an instrument for the horse in question, and, considering his value, the purpose for which he was purchased, and the fact that at the time of the consummation of the sale the plaintiff executed to defendants deeds in writing for the land, the probabilities, in my opinion, confirm the plaintiff's testimony to the effect that the bill of sale with the guaranty was executed by defendants at the time of the sale and as a part of it. And this conclusion

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Points decided.

is further sustained by the circumstance that the bill of sale and the deeds bear the same date.

But one other question remains to be determined, and that is the amount of damages to which plaintiff is entitled. The counsel for the respective parties are agreed that the true measure of damages is the excess of the value the horse would have had if he had been a reasonably sure foal-getter, over his value in his barren condition, and, in addition, a fair compensation for the loss incurred by the plaintiff in his effort in good faith to use him for the purpose for which he was purchased. I think the evidence shows the cash value of the horse at the time of sale was \$2,000, and that in his barren condition, as subsequently ascertained, his value was and is \$250. The plaintiff received the horse about the 1st of February, and from that time on, and especially during the months of April and May, repeated efforts were by plaintiff's direction made to test the capacity of the horse, and ample evidence given of his unfitness for breeding purposes. The horse should then have been returned by plaintiff to defendants. For expenses subsequently incurred I do not think plaintiff should be allowed. For the board and wages of the man employed to care for the horse during the months of February, March, April, and May, the plaintiff will be allowed at the rate of \$55 per month, aggregating \$220. It results that plaintiff is entitled to judgment against defendants for the sum of \$1,970 and costs. Ordered accordingly.

MACDONALD v. MCLEAN.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MARCH 26, 1889.

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—JOINT MARKING TOOL.—Letters patent No. 334,125, January 12, 1886, to Malcom Macdonald, are for an implement for marking and dressing the joints of cement pavements and surfaces, having on its face a V shaped blade with concave sides for making the indentation or joint and convexing its sides, and laterally concaved surfaces on its face on each side of and adjoining the blade, and continuing the curvature of its sides for convexing the edges and adjacent surfaces of the joint, the whole face being convexed in the direction of its length, and a handle and shank being bolted between the side pieces above the blade, which is also clamped between

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them. For many years before the application tools laterally concave and longitudinally convex on their faces were in general use, and produced in substantially the same way, substantially the same results. *Held*, that though the patented implement may be more perfect in lateral concavity and longitudinal convexity, and consequently do better work, the patent is void for want of novelty.

Before Ross, District Judge.

In equity.

Bill by Malcom MacDonald against William McLean, for the infringement of letters patent No. 334,125, issued to complainant January 12, 1886, on application filed August 26, 1885. The claims are:—

“(1) A tool or implement for marking and dressing the joints of cement pavements and surfaces, having on its face a cutting blade or rib for making the indentation or joint, and laterally concaved surfaces on its face on each side of and adjoining the blade or rib for rounding or convexing the edges and adjacent surfaces of the joint, substantially as herein described. (2) A tool or implement for marking and dressing the joints of cement pavements and surfaces, having on its face a V shaped cutting blade or rib with concave sides for making the indentation or joint and convexing its sides, and laterally concaved surfaces on its face on each side of and adjoining the blade or rib, and continuing the curvature of its sides, for rounding or convexing the edges and adjacent surfaces of the joint, substantially as herein described. (3) A tool or implement for marking and dressing the joints of cement pavements, having a rubbing face and a cutting blade or rib thereon for the joints, the face and rib being rounded or convexed in the direction of its length, substantially as described. (4) A tool or implement for marking and dressing the joints of cement pavements and surfaces, having on its face a cutting blade or rib with concave sides for making the indentation or joint and convexing its sides, and laterally concaved surfaces on its face on each side of and adjoining the blade or rib, and continuing the curvature of its sides, for rounding or convexing the edges and adjacent surfaces of the joint, the whole face of the implement, including the blade or rib, being rounded or convexed in the direction of its length, substantially as herein described. (5) A tool or implement for

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marking and dressing the joints of cement pavements and surfaces, consisting of the angled pieces, *a*, the blade or rib, *B*, and the handled shank, *d*, both blade and shank being clamped between the angled pieces, substantially as herein described.

(6) A tool or implement for marking and dressing the joints of cement pavements and surfaces, consisting of the angled pieces, *a*, having laterally concaved faces, the V shaped blade or rib, *B*, clamped between the angled pieces, and projecting below their faces, and the handled shank, *d*, clamped between said pieces, substantially as herein described. (7) A tool or implement for marking and dressing the joints of cement pavements and surfaces, consisting of the angled pieces, *a*, having laterally concaved and longitudinally convexed faces, the V shaped curved blade or rib, *B*, having concaved sides, and clamped between the pieces, *a*, and the handle, *D*, and the shank, *d*, bolted between said pieces, substantially as described."

Messrs. Finlayson & Finlayson, for complainant.

Messrs. Graves & O'Melveny and *Messrs. Chapman & Hendrick*, for defendant.

ROSS, J. The bill in this case is founded on letters patent issued to the complainant for a joint marking and dressing tool for cement pavements. It charges infringement by defendant, and seeks to have him enjoined from further infringement, as well as to recover damages for past infringements. Besides denying any infringement, the defendant, in his answer, for the purpose of avoiding the patent, alleges: *First*, that the complainant was not the original inventor of any material or substantial part of the tool described in the patent and bill, but that the same was invented by one Magner, of Oakland; and, *secondly*, that a tool similar to complainant's patented tool had been in public use, and on sale in the open market in the state of California, more than two years before complainant made his application for a patent; that said tool had been for more than two years before said application publicly manufactured and sold in the cities of San Francisco, Los Angeles, and Oakland, and was publicly used in said cities by certain persons named

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in the answer. Voluminous testimony was taken, and a large number of exhibits introduced in evidence. I have examined the testimony and exhibits with care, and have reached the conclusion that the patent is invalid for want of novelty. No useful purpose would be served by a review in detail of the evidence. It is sufficient to state the grounds of my decision. If the patent is valid, I have no doubt from the evidence that the defendant infringed; but I think the evidence clearly shows that tools similar to complainant's patented tool were in public and general use in California more than two years before his application for a patent. What is claimed by the complainant as patentable is the lateral concavity and the longitudinal convexity of the face of the tool. Now, many of the numerous tools introduced in evidence, and which are shown to have been in general use in the trade for many years prior to complainant's application for a patent, are made upon precisely the same principle, and, as the evidence shows, produce in substantially the same way substantially the same results. The face of them is concave laterally and convex longitudinally, and they mark or joint the cement, to prevent cracking in the process of drying, and round or dress the edges to prevent chipping, just as complainant's tool does. It may be that complainant's tool attains a greater degree of perfection in its lateral concavity and longitudinal convexity, and consequently does better work than any of the others, but that is not sufficient; the established doctrine being that "a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results, is not such invention as will sustain a patent." (*Smith v. Nichols*, 21 Wall. 119.) The bill must be dismissed, with costs to defendant, and it is so ordered.

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THE IMPERIAL AND THE S. G. REED—THE ALBINA FERRY
COMPANY, LIBELLANT.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 28, 1889.

1. COLLISION—TUG AND TOW. — A tug employed by a ship to move her from her anchorage in the Wallamet River to a dock in East Portland, under the direction and control of the pilot in charge of the ship, is not liable for injury, caused by a collision of such vessel with another; in such case the tug and tow are but one vessel, and that one is the tow.
2. OBSTRUCTION TO NAVIGATION. — A wire cable, used as a guide across the Wallamet River by the ferry-boat of the Albina Ferry Company, when held up within $11\frac{1}{2}$ feet of the surface of the water, at 18 feet from the end of the boat, and 150 feet from the shore, in water over 30 feet in depth, in the vicinity of the approach of sea-going vessels, to the Irving dock in East Portland, is a material obstruction to navigation, and unlawful, unless sanctioned by the legislature.

Before DEADY, District Judge.

Mr. P. L. Willis, for the libellant.*Mr. Cyrus Dolph*, for the S. G. Reed.*Mr. Edward N. Deady*, for the Imperial.

DEADY, J. This suit is brought by the libellant, the Albina Ferry Company, to recover damages in the sum of \$500, alleged to have been caused by a collision of the ship Imperial, while being towed by the steamboat S. G. Reed, with the ferry-boat Veto No. 2.

The facts appear to be as follows: Between one and two o'clock in the afternoon of September 14, 1888, Albert Betts, a Wallamet River pilot, was employed to dock the Imperial at the Irving dock, in East Portland, and for that purpose obtained from the claimant, the Oregon Railway and Navigation Company, the use of the steamboat S. G. Reed and crew.

The Imperial was lying at anchor in the river some distance below Montgomery dock, in Albina, and to the west side of the river. Her length is 198 feet, and her beam 38 feet. She had just arrived from Wilmington, California, in ballast, and was 15 feet out of water, and 13 feet in.

At the time of the collision the Veto No. 2 was being run by the libellant, a corporation formed under the laws of Oregon,

under a license, as a ferry-boat between her slip or landing, on the east side of the Wallamet, in Albina, just south of river lot 19, and her landing on the west side of the same, on lots 26 and 27, in the Couch addition to Portland, the width of the river between such landings being about 1,200 feet. North of the ferry slip the river front is occupied for about 1,000 feet by the Allen and Lewis warehouse and the Montgomery dock. About 100 feet south of the ferry slip is Shaver's wharf and Irving's dock is about 350 feet south of the same.

In the space between the ferry slip and Shaver's wharf is a small floating wood wharf or pontoon, with a waiting-house on it. The ferry-boat is run on a steel wire cable $3\frac{1}{4}$ inches in circumference and fastened to the shore at either end. The cable is supported by and passes over a cheave or block held in a hanger 18 inches above the water, which is fastened to the under side of the guard on the upper side, and at each end of the boat, about 18 feet from the end of the same.

The Veto, when in its slip on the east side, extends about 60 feet into the water beyond the dock line, and immediately off the outer end thereof the water is from 25 to 30 feet deep and deepens to the middle of the river.

At the time of the collision, the cable off the end of the boat was within 10 feet and 5 inches of the surface of the water, and at 18 feet beyond, it was within $11\frac{1}{4}$ feet.

The Reed made fast to the Imperial on her starboard side, and the two vessels, propelled by the wheel of the former, and navigated as one, under the charge of pilot Betts, started up stream, heading eastward for the lower end of Montgomery dock. The wind was blowing from the east, according to the report of the signal office, at the rate of six miles an hour; and to avoid being blown over to the west side, the pilot purposed to keep the vessel under the lee of the docks on the east side.

When the vessel was within 100 feet of the dock line, at the lower end of the Montgomery dock, she was straightened up the river and the engine on the Reed stopped, to lessen the headway; but the vessel commencing to drift to the west, and at about 300 feet from the ferry slip the engine was "started up" again, at about 100 feet therefrom, it was stopped again, and the vessel

moved along in the direction of Irving's dock at not exceeding two miles an hour.

At this time the ferry-boat was at her east landing, under the charge of a collector and engineer who had seen the Imperial coming up the river, some 600 or 700 feet away, and thought, as they say, that she was going to stop below them, because she was so close in to the docks. There were some vehicles and passengers on the boat apparently bound west. The collector and engineer were on shore examining the condition of the cable and the pontoon on which the boat made its landing. As the Imperial came in front of the slip the engineer saw her, and being, as he says, alarmed at her proximity to the ferry-boat, he jumped on board, ran into the engine room, and commenced to work her ashore into the slip, which the collector says he did.

And here arises the disputed question in the case. It is alleged by the libellant, that the Imperial ran on and against the apron of the ferry-boat and pushed it around and up stream until the cable broke, when it gave way in the direction of the shore and allowed the ship to pass on to the dock. On the other hand, the claimants insist that the Imperial did not strike the ferry-boat at all, and was not nearer to her than 20 feet, but that in passing along at that distance or more in front of her, the keel of the Imperial caught the cable of the ferry-boat, and pulled the latter around until the cable parted or pulled loose from its fastenings on the bank.

Neither the collector nor the engineer of the ferry-boat can say that the Imperial touched her, because they were not in a condition to see whether she did or not. The collector was on shore, and I suppose the house on the ferry-boat obstructed his view. However, without explanation, he says he could not see whether the ship touched the boat or not. The engineer was in the engine room and could not see, but he says he felt a jar which he thought was caused by a collision of the vessels.

One witness called by the libellant, Marshal Peterson, who was engaged in shingling a small wharf house to the south, and in the immediate vicinity of the ferry-boat, says the ship struck the apron of the ferry-boat and pushed it around. John Lund, who was called by the libellant, and was also shingling on the

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same house, says the ship was 15 or 20 feet from the boat—she struck the cable and turned the boat around. Arthur Bell, who was on Shaver's wharf at the time, says the ship did not touch the ferry-boat, and that she was between 20 and 30 feet away from her. Albert Betts, the pilot in charge of the Imperial, says the ship was 20 or 30 feet away from the ferry-boat—and that as the latter came abreast of the ship's forerigging, he saw the ferry-boat commence to move away, when he knew that the ship's keel had caught the cable. He immediately gave orders to back the engine, but before the ship could be stopped something parted or gave away, the boat righted, and the ship passed on.

On this testimony it must be found that the ship did not collide with the boat, and that she passed outside of her at least 20 feet. There is scarcely any room for doubt on the subject. Peterson appears to have been very much alarmed for his own safety, and must be mistaken.

Several independent circumstances in the case also point to the same conclusion.

For instance, the apron of the boat does not appear to have sustained any appreciable injury. One of the witnesses for the libellant says it was twisted some. The hanger at the outer end of the boat through which the cable passed was torn out of the guard. Now, if the apron had been caught between the Imperial on the lower side and the cable on the upper, it would have been seriously injured, if not destroyed.

And if the Imperial had so come in contact with the apron, and thereby pushed the boat against the cable, it is not possible that the hanger by which the latter was supported could have been pulled out. But if the Imperial caught the cable on its keel, 20 feet distant from the boat, and thereby dragged the latter around and up stream, it is easily seen that the hanger might have been pulled out or given away, as it did.

The actual damage sustained by the occurrence is not very great. The injury of the boat is estimated by the manager of the libellant at \$100, to the pontoon \$25, and to the cable \$200. A carpenter who examined the boat in December, says that the repairs to it then "in sight" would not cost to exceed \$40. The cable was parted near the end, and by fastening it lower

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down on the bank, as has been done, it is as serviceable as ever. Still its value is undoubtedly diminished somewhat. But without more explicit testimony on the subject, the court would not be warranted in finding that its value was diminished \$200, or any considerable portion of such sum. The pontoon was not actually injured, but the cable was fastened to it, and thereby it was pulled out of place; and in getting it back it had to be more or less taken to pieces.

On this state of facts counsel for the owners of the Reed insist that the steamboat is not liable for any damages which the libellant may have sustained.

The Reed was employed by the pilot of the Imperial for the purpose of towing that vessel, and at the time of the collision, was in the control of and in the service of the ship. There is no evidence of any fault, negligence, or misconduct on the part of the steamboat, or any one employed on her.

Under these circumstances the steamboat and ship constituted but one vessel, and that vessel was the ship. The tug was the mere servant of the tow, and both were under the control and direction of the pilot in charge of the latter. Admitting for a moment that a wrong has been committed, the owners of the Imperial, through their agent, the pilot in charge, are the wrong-doers, and their vessel is alone liable therefor. The owner of the Reed did not participate in the supposed wrong, neither by itself nor its servants. As well say that the wrong of a person who recklessly rides another down in a public thoroughfare is the wrong of the liveryman from whom he hired the horse. (*Smith v. The Creole*, 2 Wall. Jr. 512; *The Sampson*, 3 Wall. Jr. 14; *Sturgis v. Boyer*, 24 How. 124; *The Maria Martin*, 12 Wall. 44; *Cohen's Admiralty*, 225.)

It is not denied that there may be and have been cases in which both tug and tow are liable for the damage sustained by a collision. But in such case both participate in the management of the vessel, and the negligence or misconduct causing the same. *The Civilita and The Restless*, 103 U. S. 699, is such a case.

The libel is dismissed as to the S. G. Reed.

The liability of the Imperial depends on the right of the

libellant to maintain this cable in the river, where and as it was, when caught on the keel of the vessel.

In my judgment the cable was not slack enough—was held too near the surface of the water. At 18 feet from the end of the boat in water over 30 feet deep, and in the line of the approach to public docks, it was held within $11\frac{1}{2}$ feet of the surface when it ought to have been at least 20 feet below the same. Eighteen feet from the end of the boat is 36 feet from the point where the cable passes through the hanger, and commences to descend into the water. It ought to descend at an angle of not less than 45 degrees, so that in 30 feet or less of water it would be on the ground in 36 feet from the hanger, or 18 feet from the boat, in a horizontal line. In such case it would be safe for any vessel drawing not more than 20 feet of water to pass within 20 feet of the ferry-boat, at least when lying in or at her slip, without any special strain on her cable.

It may be admitted that it is not so convenient to run a boat on a slack line as a taut one. But it must be borne in mind that there is no authority for obstructing the navigation of the river with this cable, and therefore it must be managed, even to the inconvenience of the ferry owners, so as not to constitute a material obstruction to navigation.

This question has been before this court before. In *The Vancouver*, 2 Sawy. 381, it was considered and dismissed, with the suggestion that whether a ferry cable is an obstruction or not, must depend on the circumstances of the particular case.

In *Ladd v. Foster*, 31 Fed. Rep. 827, the court said: "It is not claimed that there is any legislative authority for stretching this cable across the river, and using it as is done by the defendant, the Albina Ferry Company. A cable lying on the bottom of the river is not an obstruction to navigation, while if stretched across at or near the surface of the water it would be. Between these extremes it may depend on circumstances. When a ferry-boat running on a cable, stretched loosely across the river in comparatively still water, only takes the wire off the ground a few feet in the front and rear of it, as it passes along, no material obstruction to navigation may result."

In *Atlee v. Packet Co.* 21 Wall. 395, the supreme court held

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that a pier built in one side of the channel of the Mississippi River, as part of a boom for holding saw-logs adjacent to a mill, without legislative authority, was unlawful, and the person who erected and maintained it there, held liable in damages for a collision between it and a barge descending the river, although there was ample space for passage of the vessel farther out in the stream.

But although the cable at the point where crossed by the Imperial was an unlawful obstruction to navigation, that fact would not justify the pilot of the Imperial, in wantonly or negligently running his vessel afoul of it. In such case, the Imperial would be held liable for half the damages sustained by the libellant. (*Atlee v. Packet Co.* 21 Wall. 395.)

But there is no evidence tending to show that the pilot knew this cable was so near the surface of the water, or that he was negligent in not ascertaining the fact. Indeed, he states in his testimony that he had previously passed safely over the cable of this ferry, in the same vicinity, at a less distance from the boat, with a vessel drawing 20 feet of water.

The use of cables in the maintenance of ferries on the Wallamet River appears to be a great convenience, if not a necessity. This being so, it may be said that ships, and other means of navigation should be required, as in the case of bridges, to yield some portion of their abstract right to move at pleasure on or through the water, for the benefit of the ferries. But the legislature is the only authority that can be invoked for this purpose. So long as the cable is used without the sanction of the legislature, and the court finds, as a matter of fact, that in the instance before it the cable is a material obstruction to navigation, it must give judgment accordingly. The libel is dismissed, and the claimants must have a decree for costs.

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- by the master that he did not know; *held*, that this did not constitute a speaking of the ship, and a declining of the services of the pilot, such as entitled the latter to half pilotage under section 2466 of the Political Code of California. *Freeman v. The Steamship Australia*, 200.
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that the usage was to insert "rusty" in bills of lading therefor from Liverpool to this port. *Held*, the burden of proof is on the carrier to show that the iron was otherwise affected than by atmospheric rust at the time of its receipt by the vessel. *Ib.*

20. PERIL OF THE SEA—PROPER SKILL AND DILIGENCE. —Admitting that the breaking of the mast-coat during a storm in which the decks are flooded, whereby a stream of water goes down the mast into the hold, is a peril of the sea, the exercise of proper skill and diligence would lead to the discovery of the rust, and secure the repair of the same in a less period than twelve or eighteen hours. *Ib.*
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22. CAUSE OF DISCHARGE. —A premeditated and persistent shirking and slighting of duty, or a deliberate and continued attitude of insolence and defiance by a seaman, is a sufficient cause for discharge, particularly when it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty. *Ib.*
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28. COLLISION—TUG AND TOW. —A tug employed by a ship to move her from her anchorage in the Wallamet River to a dock in East Portland, under the direction and control of the pilot in charge of the ship, is not liable for injury, caused by a collision of such vessel with another; in such case the tug and tow are but one vessel, and that one is the tow. *The Imperial*, 639.
29. OBSTRUCTION TO NAVIGATION. —A wire cable, used as a guide across the Wallamet River by the ferry-boat of the Albina Ferry Company, when held up within 11½ feet of the surface of the water, at 18 feet from the end of the boat, and 150 feet from the shore, in water over 30 feet in depth, in the vicinity of the approach of sea-going vessels, to the Irving dock in East Portland, is a material obstruction to navigation, and unlawful, unless sanctioned by the legislature. *Ib.*

AGENCY.

1. **AGENCY WITH INTEREST—REVOCATION OF.**—An agency or authority, coupled with an interest in the subject-matter thereof, may be revoked by the principal in pursuance of a stipulation or reservation to that effect in the instrument constituting the agency or authority. *Or. & W. M. S. Bk. v. Am. M. Co.*, 260.
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ARBITRATION.

1. **SUBMISSION TO ARBITRATION—REVOCATION OF.**—A submission to arbitration, where the same is not made a rule of court, or otherwise regulated by statute, may be revoked by either party thereto, at any time before an award is made, and the remedy of the adverse party, if he is damaged thereby, is by an action on the agreement to submit. *Or. & W. M. S. Bk. v. Am. M. Co.*, 260.

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BONA FIDE PURCHASER.

1. **BONA FIDA PURCHASER.**—One who takes a mere conveyance of another's interest in real property, or a quit-claim thereto, is not a purchaser for a valuable consideration within the rule in equity, which protects such a purchaser against a prior conveyance or right of which he had no notice; for by the very terms of his conveyance he has notice that he is purchasing nothing more than the interest or right his vendor then hath in the land. *Gest v. Packwood*, 202.
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BROKERS AND FACTORS.

1. **FACTORS AND BROKERS—AUTHORITY—CONSTRUCTION OF CONTRACT.**—A direction to sell "Blum's shells; total shipment; not under £85 per ton," does not authorize the consignee to sell parts of the shipment of average quality at or above the limit, and thus throw the part unsold upon the hands of the owner. The consignee is only authorized to sell in one lot, or, at least, to sell the whole in such manner as to realize the price limited for the whole lot. *Levison v. Bal-four*, 223.
2. **SAME—EXCEEDING AUTHORITY—LIABILITY TO CONSIGNOR.**—Where a consignee of goods of different qualities is only authorized to sell the whole in one lot, at a limited price per ton, sells a part of average quality at a price above the limit, but does not sell the remainder, he is liable to account to the consignor for the whole at the price limited. *Id.*

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CHINESE AND CHINESE EXCLUSION ACT.

See CITIZEN; HABEAS CORPUS; CONSTITUTIONAL LAW.

CITIZEN.

1. **CITIZENS OF CHINESE DESCENT.**—A person born in the United States of Chinese parents is, by the rule of the common law and by force of the fourteenth amendment, a citizen of the United States, and when restrained of his or her liberty of locomotion therein, may be delivered therefrom, on habeas corpus, by the proper national court. (*Ex parte Chin King*, ante, 334; 35 Fed. Rep. 354, affirmed.) *In re Yung Sing Hee*, 482.
2. **EXCLUSION ACTS CONFINED TO SUBJECTS OF FOREIGN POWER.**—Neither of the exclusion acts of 1882, 1884, nor 1888, purport to exclude from the United States the descendants of Chinese, born within the jurisdiction thereof. *Id.*

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CONTEMPT.

1. **CONTEMPT — PUNISHMENT — IMPRISONMENT — REMISSION.** — The petitioner and his wife were present in court, of which he was an attorney, during the reading of an opinion in the cause to which they were parties; and the latter rising interrupted the presiding justice, and charged him with having been bribed to render the decision. She refusing to be seated the marshal, under order of the court, attempted to remove her from the court-room, when the petitioner struck him a severe blow in the face. Both she and the petitioner resisted her removal, using profane, opprobrious, and threatening language towards court, officers, and those assisting, and were only overcome by force. The petitioner attempted to draw a bowie-knife immediately after striking the marshal, and as he was going out of the court-room succeeded in drawing it, and in the corridor adjoining brandished it, with threats, until it was forcibly taken from him. His wife also had a loaded pistol in her satchel. He was sentenced to six months' imprisonment for contempt, and, after a few days, presented a petition to the court for a revocation of the order of commitment, which stated that he did not intend to say or do anything disrespectful to the court or any of its judges, and attempted a justification, but misstated the facts, as known to the court and set forth in the affidavits of others present, and expressed no regret for his acts. *Held*, that the order should not be remitted; that the forcible resistance to an officer of the United States in the execution of the lawful orders of their courts was an indignity and insult to the power and authority of the government, which were not extenuated by any averment that no disrespect was intended to the courts making the orders. *In re Terry Contempt*, 440.
2. **CONTEMPT — PUNISHMENT — COMMUTATION FOR GOOD BEHAVIOR.** — One undergoing imprisonment for contempt is not "a prisoner convicted of an offense against the laws of the United States," within the meaning of the act of Congress of March 3, 1875 (1 Supp. Rev. Stats. 184), which allows to such a prisoner, confined "in any prison or penitentiary of any state or territory which has no system of commutations for its own prisoners," a deduction of five days in each calendar month during which no charge of misconduct has been sustained against him. *In re Terry*, 598.
3. **SAME.** — Besides, the act is not applicable to one confined in a county jail in California, which state has a system of commutations for its own prisoners, though that system does not allow deductions for prisoners confined in a jail. *Id.*
4. **SAME.** — Nor is such prisoner entitled to the credit under the Revised Statutes, United States, section 5544, which provides that "in other cases all prisoners now or hereafter confined in the jails or penitentiaries of any state, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary," as the California commutation act of March 14, 1881, relates only to state prisons, and has no application to prisoners in county jails. *Id.*
5. **SAME.** — Even if the California act applied to prisoners in county jails, one imprisoned for the term of six months would not be entitled to a credit, as it provides that one entitled to credit "shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years," etc., and contains no credits for months or fractions of a year. *Id.*

CONSTITUTIONAL LAW.

1. **BANISHMENT BY LEGISLATIVE ACT.**—A legislative act which undertakes to inflict the punishment of banishment or exile from the United States, on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the constitution and therefore void. *In re Yung Sing Hee*, 482.
2. **CHINESE—EXCLUSION ACT OF 1888—CONSTRUCTION.**—The Chinese exclusion act, approved October 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before the passage of the act. *In re Chae Chan Ping*, 486.
3. **SAME—CONSTITUTIONAL LAW—EX POST FACTO LAW.**—The Chinese exclusion act of October 1, 1888, is a valid act. It is not unconstitutional as being a law divesting rights fully vested under the several treaties between the United States and China, and the prior restriction acts of 1882 and 1884, to which it is supplemental, or as being an *ex post facto* law. *Ib.*
4. **SAME—OBLIGATION OF CONTRACTS—CERTIFICATES UNDER ACT OF 1882.**—Certificates issued under the restriction acts of 1882 and 1884 are not contracts between the United States and the Chinese laborers, to whom they are respectively issued. They are issued as evidence to identify parties entitled to privileges provided for in our treaties with China, and acts passed to give them effect. *Ib.*
5. **SAME—TREATIES—ACTS OF CONGRESS—REPEAL.**—With respect to matters proper for congressional legislation, treaties and acts of Congress stand upon an equal footing as parts of the supreme law of the land, and a later inconsistent provision in either repeals the earlier in the other. *Ib.*
6. **CHINESE CHILDREN BORN IN UNITED STATES—CITIZENSHIP—FOURTEENTH AMENDMENT.**—A person born in the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the government of China, or other foreign power, is born subject to the jurisdiction of the United States, and he is a citizen thereof, under the fourteenth amendment to the national constitution. *In re Wy Shing*, 590.
7. **SAME—EXCLUSION ACTS—CONSTRUCTION.**—The Chinese restriction acts of 1882 and 1884, and the exclusion act of 1888, are not applicable to citizens of the United States, though of Chinese parentage. *Ib.*
8. **CONSTITUTIONAL LAW—RIGHTS OF CITIZENS.**—No citizen can be excluded from the United States, except in punishment for crime. *Ib.*
9. **CONSTITUTIONAL LAW—INTERSTATE COMMERCE—PILOTS—HALF PILOTAGE.**—The Political Code of California, section 2466, imposes half pilotage on vessels when a pilot is declined, but section 2468 exempts "from all charges for pilotage, unless a pilot be actually employed, all vessels coasting between San Francisco and any port in Oregon, or in Washington or Alaska territories, and all vessels coasting between the ports of this state." The Revised Statutes of the United States, section 4287, provide that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage, or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states." *Held*, that the California statute is void for unlawful discrimination, and half pilotage cannot be collected under it. *Freeman v. The Undaunted*, 616.

COPYRIGHT AND COMMON-LAW RIGHT OF AUTHORS.

1. **COPYRIGHT—COMMON-LAW RIGHT—RIGHTS OF PURCHASER—SUBSEQUENT PUBLICATION.**—Where an author sells the exclusive right to use an operetta in America, and the purchasers are in possession of the manuscript before there

is any publication in this country or Europe, the author cannot thereafter sell the right to a third person to perform it in this country, or dedicate it to the public by publication, so as to defeat the purchasers' prior exclusive right. *Goldmark v. Kreling*, 810.

2. **SAME—INFRINGEMENT—WHAT CONSTITUTES—OPERETTA "NANON."**—Plaintiffs were the exclusive owners of the manuscript copy of the operetta "Nanon." Defendants were producing a play under the name of "Genée's Nanon, the reigning Eastern and European sensation," which they claimed to have translated and adapted from an old French story, "Nanon." Both plays contained eight characters in common, not in the French; one character had the same name in each, different from the French; the scenes and situations in each were alike, each had ideas expressed alike, not in the French; and defendants advertised their adaptation as "Genée's," and not as their own, from the French. *Held*, that defendants' play was substantially the same as complainants', with only colorable changes; that plaintiffs were entitled to an injunction to restrain defendants from performing it as a whole, or the piano score, the libretto, containing the dialogue, stage business, situations, etc., or any part as performed by defendants, except the orchestration, which was their own work, or any work under the name of "Nanon" or "Genée's Nanon, the reigning Eastern and European sensation." *Id.*

CORPORATIONS.

1. **INDEBTEDNESS OF A CORPORATION FOR WHICH A STOCKHOLDER IS LIABLE.**—A corporation being the lessee of property, permitted waste thereon for which the lessor, in an action for damages, recovered a judgment for five thousand three hundred dollars, and the corporation being insolvent, brought suit against a stockholder thereof, on whose stock more than that amount was then unpaid, to enforce the payment of the judgment. *Held*, that whether the original claim of the plaintiff for damages was or was not an "indebtedness" of the corporation within the scope of section 8 of article 11 of the constitution of the state, which declares that a stockholder of a corporation "shall be liable for the indebtedness" of the same, to the amount unpaid on his stock, the judgment obtained thereon is such an "indebtedness"; and any stockholder of the corporation is liable therefor, to the plaintiff therein, to the amount unpaid on his stock. *Powell v. Or. Ry. Co.*, 535.
2. **LIABILITY OF STOCKHOLDER.**—A judgment against a corporation for the recovery of money is conclusive evidence in a suit against a stockholder for the collection of said judgment, of the existence of the corporation, and its liability to plaintiff therein, as thereby determined; and such judgment, whether given in an action *ex contractu* or *ex delicto*, is an indebtedness of the corporation for which a stockholder is liable to the amount due on his stock. *Id.*
3. **STATUTE OF LIMITATIONS.**—In a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute does not commence to run against the judgment creditor, and in favor of the stockholder, until the entry of the judgment. *Id.*
4. **CORPORATIONS—STOCKHOLDERS—STATUTORY LIABILITY—CONSTITUTIONAL LAW.**—Section 322 of the Civil Code of California, fixing the liability of stockholders of corporations adopted in 1876, is not in conflict with article 12, section 3, of the constitution of California of 1879, and was by it expressly continued in force. *Borland v. Haven*, 551.
5. **SAME—COURTS—NATIONAL JURISDICTION.**—New remedies afforded by state statutes will be applied, and new rights given, enforced, in the national courts. *Held*, accordingly, that an action at law, to enforce the individual liability of

- stockholders, under provisions of the Civil Code of California, may be maintained in the circuit court of the United States. *Ib.*
6. SAME—ENFORCEMENT OF LIABILITY—EVIDENCE.—In suits to enforce the statutory liabilities of a stockholder for his proportionate share of a debt of the corporation, under the Civil Code of California, testimony that, in a suit against the corporation to recover such debt would be competent to establish the demand against the corporation, is competent to establish the same against the stockholder. *Ib.*
 7. SAME—EXTENT OF LIABILITY—ASSIGNMENT OF STOCK.—Under the Civil Code of California, the liability of an owner of stock of a corporation continues until a transfer of the shares once held by him has been entered upon the records of the corporation, and this whether the stock stood on the books of the corporation in the name of such owner, or in the name of some other person, as trustee, without disclosing the name of the true owner. *Ib.*
 8. SAME—DIRECTOR AS CREDITOR.—A stockholder, and even a director, may become a creditor of a corporation where the action is not tainted with fraud or other improper act. *Ib.*
 9. SAME—BANKS AND BANKING—LOANS TO DIRECTORS.—Where a bank advances money to a corporation upon a director's becoming security, and the form of the security is a promissory note of the corporation made payable to the order of one of its directors, and indorsed by him to the bank, the transaction is between the corporation and the bank, and not between the corporation and the nominal payee of the note. In such case, when the note goes to protest, and is afterwards paid by the director, who is the nominal payee and the indorser, a liability accrues against the corporation for the amount paid in favor of the party so paying. *Ib.*
 10. SAME—RE-INSTATING RESCINDED CONTRACT.—Where two corporations make a valid agreement, whereby an indebtedness of one corporation is extinguished, or assumed by the other, it is competent for said corporations, by mutual agreement duly made, to rescind such agreement, re-instate the liability of the corporation so discharged, and place the parties *in statu quo*; and the stockholders of the debtor corporation in such case will become personally liable for their respective proportionate shares of the liabilities so created or re-instated. *Ib.*
 11. SAME—DIRECTORS.—Where the directors of a corporation, acting in good faith, upon the reports and representations of the duly authorized agents of the corporation, believing them to be correct, borrow money for the purposes of the corporation, it is not necessary to show that the money so borrowed was actually appropriated to the legitimate uses of the corporation, in order to establish an indebtedness against it, or a personal liability of its stockholders in favor of the lender of the money, or of the sureties who pay the loan. *Ib.*

CRIMES AND CRIMINAL LAW.

1. CUSTOM DUTIES—INDICTMENT FOR FALSE SWEARING—EXISTENCE OF OTHER BILLS OF LADING.—The fact that at the time a person entered merchandise at the custom-house there were in existence, to his knowledge, several copies of the bills of lading and invoices presented by him, does not make his sworn statement, as required by the Revised Statutes, United States, section 2841, that he does not know of, or believe in the existence of any invoices or bills of lading other than those produced by him, a false oath, as the other invoices or bills of lading intended by the statute are bills of lading or invoices different from those presented, and not merely the copies thereof which by commercial usage or statute are required to be procured. *United States v. Harrison*, 36.
2. CONSPIRACIES TO DEFRAUD THE UNITED STATES.—Section 5440 of the Revised Statutes is not limited in its operation to conspiracies to defraud the United

- States of its "revenue," but applies to all conspiracies to deprive the United States of any property or dues by means of misrepresentation or concealment of material facts. *United States v. Owen*, 53.
3. **IDEM—LIMITATION ON PROSECUTION FOR.**—The crime defined in section 5440 of the Revised Statutes is composed of the conspiracy and an act done in pursuance thereof, and as soon as the one is formed and the other committed, the crime is consummated, and the statute of limitations begins to run against a prosecution therefor; and in three years thereafter the bar is complete. *Id.*
 4. **PERJURY.**—In an indictment for perjury, it must distinctly appear that the defendant was sworn. *United States v. McConaughy*, 141.
 5. **DEPOSE AND SWEAR.**—An allegation that the defendant did "depose and swear" to the truth of the answers contained in the deposition following, does not show that the defendant was "sworn" to the truth of said answers. *Id.*
 6. **SWEAR AND SWORN.**—One may "swear" who is not "sworn"; and in such case the oath is not administered, but self-imposed, and the swearer incurs no legal liability thereabout. *Id.*
 7. **INDICTMENT—DESCRIPTION OF CRIME THEREIN.**—It is not sufficient in an indictment under section 3062 of the Revised Statutes to charge the defendant, in the language of the statute, with importing merchandise into the United States "contrary to law," or with having received or bought the same, after being so imported; but the indictment must state with reasonable certainty in what the illegality of the importation consists. *United States v. Kee Ho*, 143.
 8. **IMPORTATION CONTRARY TO LAW.**—The offense of bringing merchandise into the United States "contrary to law," as defined by section 3062 of the Revised Statutes, does not include frauds or illegalities concerning the invoicing of the same or the payment of duties thereon, which can only occur after the importation is accomplished and the merchandise brought within the cognizance of the custom officers. *Id.*
 9. **CRIMINAL LAW—ACCOMPLICES—TURNING STATE'S EVIDENCE—RIGHT TO IMMUNITY—FORFEITURE BY BAD FAITH.**—Hinz, accused as an accomplice in crime, upon a promise of immunity if he would testify truly before the grand and trial juries, and thereby aid in the indictment and conviction of his co-conspirators, testified fully before the grand jury, and upon his testimony a joint indictment was found against his associates in crime and himself. After a trial jury had been impaneled to try three of the parties, to whom a separate trial had been granted, Hinz informed the prosecuting attorney of his determination to so change his testimony as to wholly exonerate the parties on trial, and thereby render it impossible to convict them upon testimony then available; and, upon being threatened with a prosecution for perjury if his testimony should be so changed, he refused to testify at all, and the prosecuting attorney was then constrained to make, and did make, an arrangement with another accomplice to testify upon similar terms, who, having testified, was discharged, and a *not. pros.* as to him entered. Hinz was thereupon arrested, and held to answer to the indictment. After the other testimony of the prosecution and of the defense was all in, Hinz offered, and was anxious, to testify in rebuttal, but his offer was declined. *Held*, that Hinz, by refusing to testify before the trial jury, as he had agreed to do, notwithstanding his testifying before the grand jury, had forfeited all right to immunity or clemency, and subjected himself to trial and conviction, and the court refused to continue the case in order to allow him an opportunity to apply to the President for a pardon before conviction. *United States v. Hinz*, 266.
 10. **SAME—DISCRETION OF COURT.**—Whether an accomplice already indicted shall, upon promise of immunity, be admitted as a witness for the government or not, is determined by the judges in their discretion, as may best serve the purposes of justice. *Id.*

11. SAME.—If the accomplice offering himself as a witness, with the expectation of immunity, appears to have been the principal offender, he should be rejected. *Ib.*
12. SAME.—CONFESSIONS.—If an accomplice, having made a private confession upon a promise of pardon by the attorney-general, should afterwards refuse to testify, or in bad faith testify falsely, he may be convicted upon the evidence of that confession. *Ib.*
13. SAME.—ACCOMPLICE TESTIMONY—CORROBORATION.—The court will advise a jury not to convict of felony upon the testimony of an accomplice alone, without corroboration. *Ib.*
14. SAME.—If two or more accomplices are produced as witnesses they are not deemed to corroborate each other; but the same rule applies, and the same corroboration is required as if there were but one. *Ib.*
15. SAME.—PARDON—CONTINUANCE.—Although the prosecuting attorney has no authority to contract that a person convicted of crime shall not be prosecuted, if, when examined as a witness against his accomplices, he declares, fully and fairly, his and their guilt, yet when he does so under promise of immunity, and his evidence is accepted by the court, he is equitably entitled to immunity, and a recommendation for pardon; and should the prosecuting attorney not enter a *nolle prosequi*, but insist upon a trial, the court will continue the case in order to allow time for the accused to apply to the President for a pardon. *Ib.*
16. POSTOFFICE.—LARCENY FROM MAIL.—The second count in an indictment under the Revised Statutes of the United States, section 5487, charged defendant, a clerk in the Los Angeles postoffice, with stealing therefrom a registered letter addressed to the postmaster at Santa Monica, and intended to be conveyed by mail to him. The evidence tended to show that defendant received the letter, receipted for it, and in the presence of witnesses put it in the Santa Monica pouch, and locked it; that the pouch was received locked at the railway station, and carried safely, and delivered at Santa Monica locked; that, on opening it there, the card of notification was found, but not the letter, and that other persons had access to the Los Angeles postoffice besides defendant. *Held*, that the jury, if they believed this evidence, must believe beyond a reasonable doubt that defendant removed the letter from the pouch before it left the Los Angeles postoffice before they could find him guilty. *United States v. McKenzie*, 337.
17. CRIMINAL LAW.—REASONABLE DOUBT.—By reasonable doubt is not meant a possible or imaginary doubt, but a doubt that is reasonable in view of all the evidence adduced. *Ib.*
18. SAME.—CIRCUMSTANTIAL EVIDENCE.—A conviction may be had on circumstantial evidence alone, where all the circumstances distinctly point to the guilt of the accused, and are incapable of explanation upon any other reasonable hypothesis. *Ib.*
19. SAME.—CONFESSIONS AND ADMISSIONS.—Oral declarations or admissions claimed to have been made by the accused should be viewed with caution, and remarks made by him at the time of arrest or afterwards should be fairly construed in view of all the facts and surroundings. They do not preclude the jury from considering the other facts in the case. *Ib.*
20. UMATILLA INDIANS.—RULES FOR THE GOVERNMENT OF.—The President is authorized by the treaty of June 9, 1855 (12 Stat. 948), and the Revised Statutes (secs. 441, 462, 465), to make rules for the government of the Indians on the Umatilla reservation, including the establishment of an Indian court and police, and the definition of "Indian offenses," and the measure of punishment therefor. *United States v. Olapoz*, 349.
21. MISDEMEANOR INCLUDES ADULTERY.—The term "misdemeanor," as used in number 9 of the rules promulgated by the secretary of the interior on December 2, 1882, for the government of the Indians on the Umatilla and other reservations, includes "adultery." *Ib.*

22. CRIME AGAINST THE UNITED STATES—SECTION 5401 OF THE REVISED STATUTES.—An Indian woman arrested by the Indian police on the Umatilla reservation on a charge of adultery committed thereon, was committed to the Indian jail for trial before the "court of Indian offenses," and while so committed was rescued and set at liberty by the defendants. *Held*, that they thereby committed the crime of rescue, as defined by section 5401 of the Revised Statutes, by forcibly setting a person at liberty who was committed for "a crime against the United States." *Ib.*
23. INDICTMENT—CAPTION—MISRECITAL OF DATE OF FINDING.—A misrecital in the caption of an indictment of the date of its finding, it reading "1885," for "1888," where from the whole record the error appears to be merely clerical, is not fatal, as the caption is no part of the indictment. *United States v. Bornemann*, 359.
24. SAME—REVISED STATUTES, UNITED STATES, SECTION 1025.—Such error also comes within the purview of the Revised Statutes, United States, section 1025, which provides that no indictment shall be deemed insufficient by reason of any defect in matter of form only, which does not tend to prejudice the defendant. *Ib.*
25. ATTEMPTING TO VOTE ILLEGALLY.—Section 5511 of the Revised Statutes, for the prevention and punishment of corruption and misconduct at a congressional election, does not include an "attempt" to do or commit any of the acts therein specified and prohibited, except that of voting in the name of another person, and the act of aiding, counseling, procuring, or advising any person, voter, or officer, to do or omit to do any act, the commission or omission of which is thereby made a crime, and therefore an indictment will not lie thereon against one for attempting to vote at such election a second time. *United States v. Wainor*, 362.
26. EXCEPTIONS IN A STATUTE DEFINING A CRIME.—Where a statute declares an act done in the absence of certain circumstances to be a crime, an indictment charging the commission of such a crime must negative the existence of such circumstances. *United States v. Felderoard*, 513.
27. UNLAWFUL ENCLOSURE OF THE PUBLIC LANDS.—An indictment under the act of February 25, 1885 (23 Stats. 321), for unlawfully enclosing a portion of the public lands, must show that the defendant is not within any of the exceptions permitting such enclosure. *Ib.*
28. SUBDIVISION 1 OF SECTION 563 OF THE REVISED STATUTES.—This statute does not confer jurisdiction on the district courts of any crime not otherwise defined by some statute of the United States. *United States v. Lewis*, 532.
29. COMMON-LAW CRIMES.—The courts of the United States have no common-law jurisdiction in criminal cases. *Ib.*
30. ASSAULT ON THE HIGH SEAS.—An assault with a dangerous weapon on the high seas is not a crime against the United States, unless committed on board an American vessel, as provided in section 5344 of the Revised Statutes. *Ib.*
31. INDIANS—HOMICIDE—STATUTES—NOTICE.—Act of Congress, March 3, 1885, provides that "immediately upon and after the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter," etc., shall be subject to the same laws, and tried in the same courts, as are all other persons. *Held*, on indictment of Indians for the killing of another Indian, in obedience to tribal resolutions, that it was no defense that defendants never had notice of the statute. *United States v. Whaley*, 548.

CRIMES.

See ADMIRALTY.

CRIMINAL LAW.

See CRIMES.

CUSTOMS DUTIES.

1. **CUSTOM DUTIES — INDIOTMENT FOR FALSE SWEARING — EXISTENCE OF OTHER BILLS OF LADING.** — The fact that at the time a person entered merchandise at the custom-house there were in existence, to his knowledge, several copies of the bills of lading and invoices presented by him, does not make his sworn statement, as required by the Revised Statutes, United States, section 2841, that he does not know of, or believe in the existence of any invoices or bills of lading other than those produced by him, a false oath, as the other invoices or bills of lading intended by the statute are bills of lading or invoices different from those presented, and not merely the copies thereof which by commercial usage or statute are required to be procured. *United States v. Harrison*, 36.
2. **CUSTOMS DUTIES — CLASSIFICATION — CHINESE SHOES.** — Chinese shoes, consisting of an upper part of cotton or silk, and a sole of felt and leather, the felt being made from hair mixed with wool-fiber and paper, stiffened with rice starch, are not taxable under the act of 1883 (schedule K, par. 14), imposing forty cents per pound, and thirty-five per cent *ad valorem* on clothing, ready made, and wearing apparel, not enumerated, composed wholly or in part of wool, worsted, alpaca, or other hair, made up by the tailor, seamstress, or manufacturer, but as non-enumerated articles at the highest rates at which their component material of chief value may be chargeable. The cotton shoes, therefore, fall under schedule I, paragraph 7, imposing thirty-five per cent *ad valorem* on manufactures of cotton not specially provided for, and the silk ones under the last paragraph of schedule L, imposing fifty per cent *ad valorem* on goods not specially enumerated, made of silk, or of which silk is the component material of chief value. *Swayne v. Hager*, 618.
3. **A DEFINITION ADOPTED AND ACTED UPON** for a long time should not be regarded as changed by a subsequent act of Congress, unless an intention to change is clearly manifest. *Id.*

DAMAGES, MEASURE OF.

1. **MEASURE OF DAMAGES FOR A BREACH OF CONTRACT.** — The party injured by the breach of a contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided such damages may fairly be supposed to have been within the contemplation of the parties when they made the contract, and are certain both in their nature and in respect to the cause from which they proceed. *Hunt v. Or. P. Ry. Co.*, 516.
2. **CASE IN JUDGMENT.** — The plaintiff sues the defendant for damages on an alleged breach of a contract, whereby the former agreed, in consideration of certain payments to be made as the work progressed, to construct fifty-two miles of railway for the latter. The defendant sets up a counter-claim for the failure to construct the road, and claims damages therefor: (1) For the loss of the use of the road; (2) for the loss of certain freight which it had made "arrangements" to carry over the road; and (3) for the sum it will cost to complete the road in excess of the contract price. On motion of plaintiff the last two clauses were stricken out of the counter-claim; the one, as arising on a collateral contract not within the contemplation of the parties, and the other as being uncertain, and also contingent on the future construction of the road by the defendant. *Id.*

DAMAGES FOR DEATH.

1. **DAMAGES FOR DEATH.** — The damages given to an administrator for the death of his intestate by the statute of Oregon (Comp. 1887, sec. 371), are, when recovered, assets of the estate; they do not include anything but what is consequent on the death, and therefore no allowance can be made for the expenses of the illness attendant on the injury which caused the death, or of the burial of the deceased. *Holland v. Brown*, 284.

2. **DEATH—SECURITY FOR LIFE.**—These damages are in the nature of a compensation paid by the wrong-doer to creditors and next of kin of the deceased for the loss of life in which they have a pecuniary interest, and incidentally the liability to pay them is calculated to secure from carriers and corporations more consideration for the lives of passengers and employees committed to their care. *Id.*
3. **CASE IN JUDGMENT.**—Ferry-boat No. 2 and the steam launch *Mikado* collided in the Wallamet River, in front of the Portland slip of the former, and thereby caused the death of a passenger on the latter, when such collision might have been avoided and the death prevented by the proper handling of either boat. *Held*, the owners of both boats are liable to the administrator of the deceased under the statute of Oregon, *in solido*, for the damages resulting from such death. *Id.*

DEATH.

See DAMAGES FOR DEATH.

DEVISE.

See WILLS.

DOWER.

1. **DOWER IN CASE OF A NON-RESIDENT WOMAN.**—A woman who is not a resident of the state is not entitled to dower in any lands therein of which her husband did not die seized. *Thorburn v. Doecher*, 60.
2. **DOWER, VALUE OF—WHEN ESTIMATED.**—In estimating the value of a widow's dower in land aliened by the husband in his lifetime, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon. *Id.*

ENJOINMENT.

See PLEADING.

EQUITY.

1. **LIMITATION OF ACTIONS—ESTOPPEL TO PLEAD STATUTE—EQUITY.**—The fact that a debtor adds a name to his real name, removes to another state, and remains in such state under his assumed name until the cause of action against him on the demand is barred by the statute of limitations, affords no ground, under the statute of limitations of California, for enjoining the debtor from setting up the statute of limitations as a bar to an action at law to recover on the demand. *Chemical Nat. Bk. v. Kissane*, 20.
2. **SAME—IN EQUITY.**—The statute of limitations of California applies to suits in equity as well as actions at law. *Id.*
3. **SUIT TO RESTRAIN THE COLLECTION OF A TAX.**—A person who is aggrieved by the wrongful action of an assessor in the valuation of his own or others' property for taxation, cannot maintain a suit in equity to enjoin the collection of any portion of the tax resulting from such action, unless he first seeks redress at the hands of the county board of equalization, as provided by statute. *D. M. T. I. Co. v. Charlton*, 25.
4. **CONTINUOUS TRESPASS.**—Equity has jurisdiction to enjoin and prevent the commission of a continuous trespass, on the ground of the inadequacy of the remedy at law. *S. O. F. M. Co. v. S. W. D. & O. Co.*, 99.

5. **EQUITY—PRACTICE—OBJECTION TO TESTIMONY—AMENDMENT OF PLEADINGS.**—Where an objection to the relevancy or competency of the testimony is made specific for the first time in the closing argument for the complainant in an equity case, the court will permit the defendant to so amend his pleadings as to obviate the objection, where the testimony is before the court showing a proper case therefor. *Hamilton v. S. N. G. & S. M. Co.*, 118.
6. **EQUITY—MASTER—OBJECTIONS BEFORE.**—The general objection, "irrelevant and incompetent," made before the master in an equity case, is not sufficiently specific to be entitled to consideration upon the hearing. *Ib.*
7. **CROSS-BILL—RIGHT TO FILE.**—A cross-bill is a mode of obtaining relief or making a defense to which a defendant may resort as against the plaintiff or a co-defendant in the original bill without leave of the court, and the question of his right to file the same when and as it may be done may be made and determined on demurrer. *Neal v. Foster*, 236.
8. **IDEM.**—Where a cross-bill does not seek to introduce new or further testimony on the matters in issue in the original suit, it may be filed after publication has passed or the testimony thereabout is taken. *Ib.*
9. **IDEM—PUBLICATION.**—As the testimony in equity cases is no longer taken secretly or kept from the inspection of the parties until what was called publication, the mere fact of publication having passed or the testimony being closed in the original suit, ought not to prevent a defendant from filing and maintaining a cross-bill even touching matters in issue in said suit. *Ib.*
10. **RES ADJUDICATA.**—The determination of a point or question in any legal proceeding binds the parties thereto and their privies in any subsequent litigation that may arise between them, although the cause of action in the two proceedings is not otherwise identical. *Ib.*
11. **VENDOR IN POSSESSION—ACTS AND DECLARATIONS OF.**—The acts and declarations of a vendor in possession after the sale are competent evidence against the vendee, on the question of the character and purpose of such sale. *Ib.*
12. **TAXATION OF CREDITS.**—A person cannot lawfully nor truthfully omit a note from his statement of his taxable credits, on the ground that there is an understanding between him and the maker thereof, that he will not deduct the amount of the same from the value of his property listed for taxation. *Ib.*
13. **MOTIVE OF SUITOR IN NATIONAL COURT.**—The motive with which a person purchases property or a claim has nothing to do with his right to maintain an action thereon or thereabout, in the national courts; and so it does not affect the jurisdiction of said courts if the purchase is made with the expressed intention of suing therein. *Ib.*
14. **LIEN OF JUDGMENT.**—A conveyance of real property, though void as to creditors asserting their right against it, passes all the estate of the grantor in the premises to the grantee, and therefore the lien of a subsequent judgment against the grantor, which only attaches to property then belonging to him, does not affect the property so conveyed; and the creditor first seeking to set aside such conveyance obtains a prior right to satisfaction thereout, from the commencement of his suit for that purpose. *Ib.*
15. **FRAUDULENT CONVEYANCE.**—The grantee in a conveyance of real property by an insolvent debtor, having paid at least three fourths of its cash value therefor, by the redemption of certain wheat warehouse receipts of the grantor, concerning which he was then liable to a criminal prosecution, and the discharge of certain obligations on which he was surety. *Held*, that the circumstances do not warrant the conclusion that the conveyance was made or taken with intent to hinder, delay, or defraud creditors. *Ib.*
16. **SAME.**—A conveyance by an insolvent debtor of a block of brick buildings for the alleged consideration of the surrender of six notes of the grantor for the principal sum of \$16,000, payable to the grantee, which notes are in fact without consideration. *Held*, that the conveyance was voluntary and therefore fraudulent, as against the creditors of the grantor. *Ib.*

17. **REVIVAL OF SUIT ABATED BY DEATH—OBJECTIONS TO COLLATERAL ATTACK.**—Upon proceedings to revive a suit in equity abated by the death of the complainant, for the purpose of executing a final decree which has been rendered in such suit, no objections can be taken which could have been urged when the original bill was pending, except want of jurisdiction apparent upon the record. An attack upon a judgment or decree in a proceeding to revive it is a collateral attack, and can only avail when there is a want of jurisdiction, either of the parties or of the subject-matter. *Sharon v. Terry*, 387.
18. **JURISDICTION TO CANCEL FORGED MARRIAGE CONTRACT—MONEY VALUE.**—The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract, if genuine, and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract, within the meaning of the acts of Congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed when the question of jurisdiction is raised. *Ib.*
19. **SAME—PROPERTY RIGHTS AGAINST HUSBAND.**—The right of action to cancel a marriage contract, which, if genuine, and followed by the requisite consummation as mentioned above, would create rights in the property of the alleged husband, survives to his executor or administrator. *Ib.*
20. **TRANSFER OF PROPERTY PENDING SUIT.**—The transfer of the property of the plaintiff in a suit to cancel a forged marriage contract while such suit is pending does not abate it, if the plaintiff retain a right during his life to claim the rents and profits thereof, and the purchasers or beneficiaries under such transfer are entitled to the benefit of the decree rendered in such suit canceling the contract, to protect the property from claims made under or by virtue of it. *Ib.*
21. **JURISDICTION—FIRST SUIT COMMENCED.**—Where the jurisdiction of the circuit court of the United States has attached in a suit brought by a citizen of a state other than that in which the court is held, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court. *Ib.*
22. **COURT FIRST OBTAINING JURISDICTION, RETAINS IT.**—Where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinate to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree. *Ib.*
23. **SAME—EXCEPTIONS.**—The exceptions to the rule that priority of jurisdiction controls priority of decision are, *first*, where the same plaintiff has asked in different suits a determination of the same matter; and, *second*, where the cases are upon contracts or obligations, which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist. *Ib.*
24. **DECREE CANCELING FORGED INSTRUMENT—EFFECT OF.**—The decree of a circuit court of the United States canceling a forged marriage contract, may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a state court. *Ib.*
25. **SECTION 720 OF THE REVISED STATUTES CONSTRUED.**—Section 720 of the Revised Statutes, prohibiting injunctions by any court of the United States to stay proceedings in a state court, does not apply where the federal court has first obtained

jurisdiction of the subject-matter of the proceedings, and of the parties in the state court. This section must be construed in connection with section 716 of the Revised Statutes, which provides that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. *Ib.*

ESTOPPEL.

1. **ESTOPPEL BY VERDICT.**—An estoppel by verdict occurs where each of two causes of action, though not identical, include some identical fact or circumstance, and there is a verdict and judgment in an action on one of them whereby the parties are estopped to allege anything concerning such fact or circumstance contrary to such verdict. *United States v. Schneider*, 295.
2. **VERDICT IN A CRIMINAL ACTION DOES NOT ESTOP PARTIES IN A CIVIL ACTION.**—A verdict in a criminal action between the United States and S., which necessarily negatives the allegation in the statement of the cause of action, that S. was "a wholesale dealer in malt liquors," does not estop the United States from alleging that fact in a civil action against S. to recover the special taxes due from him as such dealer. *Ib.*

See EQUITY.

FEEES AND COSTS.

1. **COSTS—IN HABEAS CORPUS PROCEEDING—REVISED STATUTES, UNITED STATES, SECTION 828.**—An application for a writ of habeas corpus is a proceeding *sui generis*, and the provisions of the Revised Statutes, United States, section 827, regulating the fees of clerks of the circuit and district courts, do not govern in the taxation of costs in such proceedings. *In re Moy Chee Kee*, 121.

FRAUDULENT CONVEYANCE.

1. **FRAUDULENT CONVEYANCE.**—The grantee in a conveyance of real property by an insolvent debtor, having paid at least three fourths of its cash value therefor, by the redemption of certain wheat warehouse receipts of the grantor, concerning which he was then liable to a criminal prosecution, and the discharge of certain obligations on which he was surety. *Held*, that the circumstances do not warrant the conclusion that the conveyance was made or taken with intent to hinder, delay, or defraud creditors. *Neal v. Foster*, 237.
2. **SAME.**—A conveyance by an insolvent debtor of a block of brick buildings for the alleged consideration of the surrender of six notes of the grantor for the principal sum of \$16,000, payable to the grantee, which notes are in fact without consideration. *Held*, that the conveyance was voluntary and therefore fraudulent, as against the creditors of the grantor. *Ib.*

FRAUDULENT MARRIAGE CONTRACT.

1. **TRANSFER OF PROPERTY PENDING SUIT.**—The transfer of the property of the plaintiff in a suit to cancel a forged marriage contract while such suit is pending does not abate it, if the plaintiff retain a right during his life to claim the rents and profits thereof, and the purchasers or beneficiaries under such transfer are entitled to the benefit of the decree rendered in such suit canceling the contract, to protect the property from claim made under or by virtue of it. *Sharon v. Terry*, 387.

GENERAL LAND OFFICE.

1. **COMMISSIONER OF THE GENERAL LAND OFFICE—REGULATION BY.**—The regulation of March 13, 1875, made by the commissioner of the general land office concerning the character and quantum of evidence to be furnished the surveyor-general, with selections of land made by the agent of the state, as swamp, under the act of March 12, 1860, is an appropriate regulation of that subject, and until the contrary appears, it is presumed to have been made under the direction and with the sanction of the secretary of the interior, and has the force and effect of law. *United States v. Barnhart*, 126.
2. **FORGED AFFIDAVIT.**—A forged affidavit is within the purview of section 5418 of the Revised Statutes, when it appears therefrom or in connection with extraneous circumstances, alleged in the indictment, that it may be used to defraud the United States, as alleged. *Id.*
3. **EVIDENCE OF THE CHARACTER OF SWAMP LAND SELECTED BY THE STATE.**—An affidavit may be used as evidence under the regulation of March 13, 1875, to prove the character of lands selected by the state, as swamp and overflowed, under the act of May 12, 1860, whether made before or after such selection; and if made before, and presented to the governor for his consideration in making such selection, the presumption is that he transmitted the same, with the selection to which it relates, to the surveyor-general. *Id.*
4. **REGULATIONS OF JUNE 30 AND SEPTEMBER 1, 1880.**—The regulations of June 30 and September 1, 1880, by which the land department of the United States, in conjunction with the state, undertook by means of agents in the field to examine the character of the lands claimed by the state under the swamp land grant thereto, superseded the regulation of March 13, 1875, and thereafter no affidavit could be legally used before the commissioner or secretary of the interior on the consideration of the question, whether such lands were swamp or not, other than the affidavits of the agents employed to make such examination in the field, and therefore the affidavits alleged in the indictment to have been forged by the defendant could not have been legally used to defraud the United States. *Id.*

GUARANTOR.

See SURETY AND GUARANTOR.

HABEAS CORPUS.

1. **COSTS—IN HABEAS CORPUS PROCEEDING—REVISED STATUTES, UNITED STATES, SECTION 828.**—An application for a writ of habeas corpus is a proceeding *avi generis*, and the provisions of the Revised Statutes, United States, section 827, regulating the fees of clerks of the circuit and district courts, do not govern in the taxation of costs in such proceedings. *In re Moy Chee Kee*, 121.
2. **DEPUTY MARSHAL AT ELECTION FOR A REPRESENTATIVE IN CONGRESS—ARREST WITHOUT PROCESS—PROBABLE CAUSE OF ARREST.**—A special deputy marshal of the United States in the course of his duty made an arrest under section 2022 of the Revised Statutes, at an election for a representative in Congress, and took the party before a United States commissioner, where he was charged with aiding and counseling a person to vote at such election who had no legal right to vote, and discharged on bail; and immediately made a complaint against said deputy before a police judge, accusing him of the crime of assault and battery, by assaulting and beating the complainant, on which a warrant of arrest was issued and he was taken and lodged in the county jail; thereupon on the petition of the deputy a writ of habeas corpus was allowed by the district judge, returnable into the circuit court, then in session; and from the return to the writ it appeared that the process under which the jailer claimed to hold the deputy was the said

- WARRANT OF ARREST. On the hearing the court found that the deputy had probable cause, at the time of the arrest of the party, to believe that he had committed the crime of aiding and counseling a person to vote at such election, who had no right to vote thereat, and that the alleged assault and battery with which the deputy was charged consisted simply in the arrest of the complainant without force or violence for the crime aforesaid. *Held*, that a special deputy marshal appointed under section 2021 of the Revised Statutes, to keep the peace and preserve order at the polls at an election for representative in Congress, is, as to such election, and the crimes for which, under section 2023 of the Revised Statutes, he may make arrests without process, a peace officer; (2) that a crime is committed "in the presence" of such deputy, within the provisions of said section 2022, when the facts that are within his observation in connection with what, under the circumstances, may be considered common knowledge, give him probable cause to believe or reasonable ground to suspect that such is the case; and, (3) probable cause or reasonable ground to suspect, is such a state of facts as will constitute a defense to an action for false imprisonment or malicious prosecution, and it is sufficient if the facts or appearances are sufficient to induce a reasonable probability that all the acts which constitute the crime have been done. *In re Morrill*, 822.
3. CITIZENSHIP OF CHINESE—HABEAS CORPUS.—A child born in the United States of Chinese parents is by the rule of the common law and the fourteenth amendment, a citizen of the United States; and when restrained of its liberty of locomotion therein, may be delivered therefrom, on habeas corpus, by the proper national court. *In re Chin King*, 833.
 4. HABEAS CORPUS.—A Chinese actor claiming the right to enter the United States must produce the certificate required by section 5 of the amended restriction act of 1884. *In re Wo Tai Li*, 865.
 5. HABEAS CORPUS.—Petitioner remanded on the ground that he has failed to establish to the satisfaction of the court his right to enter the United States. *In re Tom Mun*, 867.
 6. CITIZENS OF CHINESE DESCENT.—A person born in the United States of Chinese parents is, by the rule of the common law and by force of the fourteenth amendment, a citizen of the United States, and when restrained of his or her liberty of locomotion therein, may be delivered therefrom, on habeas corpus, by the proper national court. (*Ex parte Chin King*, ante, 834; 35 Fed. Rep. 854, affirmed.) *In re Yung Sing Hse*, 482.
 7. EXCLUSION ACTS CONFINED TO SUBJECTS OF FOREIGN POWER.—Neither of the exclusion acts of 1882, 1884, nor 1888, purport to exclude from the United States the descendants of Chinese, born within the jurisdiction thereof. *Ib.*
 8. BANISHMENT BY LEGISLATIVE ACT.—A legislative act which undertakes to inflict the punishment of banishment or exile from the United States, on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the constitution and therefore void. *Ib.*
 9. CHINESE—EXCLUSION ACT OF 1888—CONSTRUCTION.—The Chinese exclusion act, approved October 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before the passage of the act. *In re Chae Chan Ping*, 486.
 10. SAME—CONSTITUTIONAL LAW—EX POST FACTO LAW.—The Chinese exclusion act of October 1, 1888, is a valid act. It is not unconstitutional as being a law divesting rights fully vested under the several treaties between the United States and China, and the prior restriction acts of 1882 and 1884, to which it is supplemental, or as being an *ex post facto* law. *Ib.*
 11. SAME—OBLIGATION OF CONTRACTS—CERTIFICATES UNDER ACT OF 1882.—Certificates issued under the restriction acts of 1882 and 1884 are not contracts between the United States and the Chinese laborers, to whom they are respect-

- ively issued. They are issued as evidence to identify parties entitled to privileges provided for in our treaties with China, and acts passed to give them effect. *Ib.*
12. **SAME—TREATIES—ACTS OF CONGRESS—REPEAL.**—With respect to matters proper for congressional legislation, treaties and acts of Congress stand upon an equal footing as parts of the supreme law of the land, and a later inconsistent provision in either repeals the earlier in the other. *Ib.*
 13. **CHINESE—EXCLUSION ACT OF 1888—DEPARTURE FROM UNITED STATES.**—Chinese subjects purchasing through tickets, and embarking in an American vessel, from one American port to another, who do not leave the vessel when she, having leave to do so, touches at a foreign port, have not departed from the United States within the meaning of the Chinese exclusion act of Congress of October 1, 1888. *In re Tung Wah Sick*, 497.
 14. **CHINESE—EXCLUSION ACT OF 1888—CHINESE SEAMEN.**—A Chinese laborer, who ships on an American vessel at an American port, for a round voyage, and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States within the meaning of the exclusion act of October 1, 1888. *In re Jack Sen*, 510.
 15. **CHINESE CHILDREN BORN IN UNITED STATES—CITIZENSHIP—FOURTEENTH AMENDMENT.**—A person born in the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the government of China, or other foreign power, is born subject to the jurisdiction of the United States, and he is a citizen thereof, under the fourteenth amendment to the national constitution. *In re Wy Shing*, 580.
 16. **SAME—EXCLUSION ACTS—CONSTRUCTION.**—The Chinese restriction acts of 1882 and 1884, and the exclusion act of 1888, are not applicable to citizens of the United States, though of Chinese parentage. *Ib.*
 17. **CONSTITUTIONAL LAW—RIGHTS OF CITIZENS.**—No citizen can be excluded from the United States, except in punishment for crime. *Ib.*

HOMICIDE.

See JURISDICTION.

HUSBAND AND WIFE.

1. **SAME—PROPERTY RIGHTS AGAINST HUSBAND.**—The right of action to cancel a marriage contract, which, if genuine, and followed by the requisite consummation as mentioned above, would create rights in the property of the alleged husband, survives to his executor or administrator. *Sharon v. Terry*, 387.

INDIANS.

1. **UMATILLA INDIANS—RULES FOR THE GOVERNMENT OF.**—The President is authorized by the treaty of June 9, 1855 (12 Stats. 948), and the Revised Statutes (secs. 441, 462, 463), to make rules for the government of the Indians on the Umatilla reservation, including the establishment of an Indian court and police, and the definition of "Indian offenses," and the measure of punishment therefor. *United States v. Clapox*, 349.
2. **MISDEMEANOR INCLUDES ADULTERY.**—The term "misdemeanor," as used in number 9 of the rules promulgated by the secretary of the interior on December 2, 1882, for the government of the Indians on the Umatilla and other reservations, includes "adultery." *Ib.*
3. **CRIME AGAINST THE UNITED STATES—SECTION 5401 OF THE REVISED STATUTES.**—An Indian woman arrested by the Indian police on the Umatilla reservation on a charge of adultery committed thereon, was committed to the Indian jail for trial before the "court of Indian offenses," and while so committed was res-

cued and set at liberty by the defendants. *Held*, that they thereby committed the crime of rescue, as defined by section 5401 of the Revised Statutes, by forcibly setting a person at liberty who was committed for "a crime against the United States." *Ib.*

4. INDIANS—HOMICIDE—STATUTES—NOTICE.—Act of Congress, March 3, 1885, provides that "immediately upon and after the passage of this act all Indians committing against the person or property of another Indian, or other person, any of the following crimes, namely, murder, manslaughter," etc., shall be subject to the same laws, and tried in the same courts, as are all other persons. *Held*, on indictment of Indians for the killing of another Indian, in obedience to tribal resolutions, that it was no defense that defendants never had notice of the statute. *United States v. Whaley*, 548.

INDIAN RESERVATIONS.

1. INDIANS—TRADING IN THE INDIAN COUNTRY—ABANDONING RESERVATION—KLAMATH RESERVATION.—By act of Congress of April 8, 1864, the President was authorized to set apart not exceeding four tracts of land in California for Indian reservations, and in his discretion to include therein existing reservations. The lands in existing reservations not thus retained were to be sold as therein provided. Four reservations were accordingly set apart, among which the previously existing Klamath reservation was not included; but possession of the latter, which contained about forty square miles, and on which were about two hundred Indians, was retained by the United States, and some steps were taken towards its disposition. *Held*, that the Klamath reservation was not "Indian country" within the meaning of the Revised Statutes, United States, section 2133, prescribing the penalty for unlicensed trading in the Indian country. *United States v. Rising Star Tea*, 298.

INDICTMENTS.

See CRIMES.

INJUNCTION.

See EQUITY.

JUDICIAL SALES.

1. JUDICIAL SALE—TITLE OF PURCHASER.—The purchaser at a judicial sale acquires only the present interest of the judgment debtor. No after-acquired title is affected by such a sale. The sheriff's deed can, at most, only have the operation of a quit-claim deed in the strictest sense. *Hamilton v. S. N. G. & S. M. Co.*, 113.

JUDGMENTS.

1. NOTICE IN SUMMONS IN A SUIT TO ENFORCE THE LIEN OF A MORTGAGE.—A suit to enforce the lien of a mortgage is not one to recover money or damages only, and therefore the notice inserted in the summons must be according to the direction in subdivision 2 of section 53, Comp. 1887. *Swift v. Meyers*, 583.
2. JUDGMENT OF STATE COURT IN THE NATIONAL COURT, SITTING IN THE SAME STATE.—The judgment of a state court may be collaterally questioned or attacked in a national court, sitting in the same state, for a want of jurisdiction over the subject-matter, or of notice to the defendant, the same as if it was a judgment of a court of another state. *Ib.*

3. **SUIT TO ENFORCE THE LIEN OF A MORTGAGE.**—A suit to enforce the lien of a mortgage by the sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident or not found, so that he cannot be personally served with process, in the state, the court may decree a sale of the property on such substituted or constructive service of process on the mortgagor as the legislature may provide; but in such case there is no presumption in favor of the jurisdiction of the court, and unless the record shows a compliance in all essential particulars with the statute authorizing such service its decree is null and void. *Id.*
4. **CASE IN JUDGMENT.**—A statute of Oregon (Comp. 1897, sec. 54) provides that if a defendant in a suit cannot be found, service of the summons may be made by delivering a copy of the same "to some person of the family . . . at the dwelling-house or usual place of abode of the defendant." In a suit to enforce the lien of a mortgage on property in Linn County, the return of the sheriff showed that the defendant could not be found, and that a copy of the summons was delivered to a "member" of the family, "at his usual place of abode in said (Linn) county," on which service the court gave a decree by default for the sale of the property under which the defendants claim. *Held*, that the service was invalid and the decrees of sale thereon null and void, because the return did not show that the substituted service of the summons was made at the defendant's usual place of abode *in the state*, in whatever county it might be, but only at his usual place of abode *in Linn County*. *Id.*
5. **CONTRADICTING A RECORD.**—*Semble*, that the record of a court cannot be collaterally impeached or contradicted except by a suit in equity, brought for the purpose of setting aside a judgment, on the ground that in fact the court never acquired jurisdiction to give the same. *Id.*

JURISDICTION.

1. **COURTS—NATIONAL—JURISDICTION—HOMICIDE—WITHIN PRESIDIO MILITARY RESERVATION.**—The Presidio military reservation, in the city and county of San Francisco, is not a place "under the exclusive jurisdiction of the United States;" and a homicide committed within the reservation is not an offense against the United States, within the meaning of section 5339, Revised Statutes. *United States v. Bateman*, 212.
2. **SAME.**—A homicide committed within said Presidio military reservation is not an offense over which the courts of the United States have jurisdiction. *Id.*
3. **COURTS—JURISDICTION—CLAIMS AGAINST UNITED STATES—SURVEYING CONTRACTS.**—The act of Congress of March 3, 1887 (24 Stats. 505), provides that where the amount in controversy is between one thousand dollars and ten thousand dollars the circuit courts shall have concurrent jurisdiction with the court of claims of "all claims . . . founded upon . . . any law of Congress, . . . or upon any contract, express or implied, with the government of the United States," etc.; "claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same" being excepted. The complaint upon a surveying contract set out that the surveyor-general of California had approved the field-notes, and certified them, as well as the performance of the work, but that before he forwarded his report to Washington, D. C., he was instructed by the commissioner of the general land office to proceed no further in the matter. Under the terms of the agreement, this report should have gone to the said commissioner, and, if approved by him, been then referred to the auditor for final allowance and payment. *Held*, on demurrer to complaint, that the claim had not been "heretofore rejected or reported on adversely," within the meaning of the act, and that the circuit court, sitting in California, had jurisdiction, the amount sued for being between one thousand dollars and ten thousand dollars. *Baker v. United States*, 221.

4. **UNITED STATES CIRCUIT COURTS—JURISDICTIONAL AMOUNT.**—Under the act of March 3, 1875 (Supp. Rev. Stats. 173), the circuit courts have no jurisdiction of an action to recover money or property wherein the United States are plaintiffs, unless the amount or value of the matter in controversy exceeds the sum of five hundred dollars, exclusive of costs. *United States v. Huffmaster*, 280.
5. **CIRCUIT COURTS—JURISDICTIONAL AMOUNT.**—Under the act of March 3, 1887 (24 Rev. Stats. 552), the United States circuit courts have no jurisdiction of an action to recover money or property wherein the United States are plaintiffs, unless the amount or value of the matter in controversy exceeds the sum of two thousand dollars, exclusive of costs. *United States v. Huffmaster*, 283, 284.
6. **COURTS—FEDERAL—CIRCUIT—JURISDICTION—CITIZENSHIP—CORPORATIONS.**—Under the act of Congress of March 3, 1887, providing that the United States circuit courts shall have original cognizance of a controversy between citizens of a state and foreign states, citizens, or subjects, but that no civil suit shall be brought before such courts except in the district whereof the defendant is an inhabitant, a citizen of Mexico cannot sue a Connecticut corporation in the United States circuit court for the southern district of California, although the corporation has an office and managing agent in that district. *Denton v. Int. Co. of Mexico*, 355.
7. **JURISDICTION OF EQUITY IN PERSONAM AND UNDER THE ACT OF 1887.**—A court of equity has jurisdiction of suit to compel the specific performance of a contract to convey land, without reference to the locality of the same; and this court has jurisdiction under the act of 1887 of a suit against the United States to compel the issue of a patent to a purchaser of timber land under the act of 1878, although the same is situated in Washington territory. *Montgomery v. United States*, 384.
8. **JURISDICTION TO CANCEL FORGED MARRIAGE CONTRACT—MONEY VALUE.**—The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract, if genuine, and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract, within the meaning of the acts of Congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed when the question of jurisdiction is raised. *Sharon v. Terry*, 387.
9. **JURISDICTION—FIRST SUIT COMMENCED.**—Where the jurisdiction of the circuit court of the United States has attached in a suit brought by a citizen of a state other than that in which the court is held, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court. *Id.*
10. **COURT FIRST OBTAINING JURISDICTION, RETAINS IT.**—Where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinate to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree. *Id.*
11. **SAME—EXCEPTIONS.**—The exceptions to the rule that priority of jurisdiction controls priority of decision are, *first*, where the same plaintiff has asked in different suits a determination of the same matter; and, *second*, where the cases are upon contracts or obligations, which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist. *Id.*

12. **DECREE CANCELING FORGED INSTRUMENT—EFFECT OF.**—The decree of a circuit court of the United States canceling a forged marriage contract, may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a state court. *Ib.*
13. **NATIONAL COURTS—CASES ARISING UNDER REVENUE LAWS—JURISDICTIONAL AMOUNT.**—Clause 4, section 629, Revised Statutes, was not repealed by the act of March 3, 1875 (18 Stats. 470), or by the act of March 3, 1887 (24 Stats. 553), defining the jurisdiction of the circuit courts, and these courts have jurisdiction in suits arising under revenue laws, although the amount in dispute is less than two thousand dollars. *Ames v. Hager*, 473.
14. **SUBDIVISION 1 OF SECTION 563 OF THE REVISED STATUTES.**—This statute does not confer jurisdiction on the district courts of any crime not otherwise defined by some statute of the United States. *United States v. Lewis*, 532.
15. **COMMON-LAW CRIMES.**—The courts of the United States have no common-law jurisdiction in criminal cases. *Ib.*
16. **ASSAULT ON THE HIGH SEAS.**—An assault with a dangerous weapon on the high seas is not a crime against the United States, unless committed on board an American vessel as provided in section 5346 of the Revised Statutes. *Ib.*

KLAMATH INDIAN RESERVATION.

See INDIAN RESERVATION.

LIENS OF JUDGMENTS.

See EQUITY.

LIMITATIONS, STATUTE OF.

1. **LIMITATION OF ACTIONS—ESTOPPEL TO PLEAD STATUTE—EQUITY.**—The fact that a debtor adds a name to his real name, removes to another state, and remains in such state under his assumed name until the cause of action against him on the demand is barred by the statute of limitations, affords no ground, under the statute of limitations of California, for enjoining the debtor from setting up the statute of limitations as a bar to an action at law to recover on the demand. *Chemical Nat. Bk. v. Kissane*, 20.
2. **SAME—IN EQUITY.**—The statute of limitations of California applies to suits in equity as well as actions at law. *Ib.*
3. **SAME.**—The statute of limitations of California provides for every exception to the running of the statute intended to be allowed, and every case wherein the time for the running of the statute is postponed beyond the time prescribed by the general provisions of the act. These exceptions are as available at law as in equity, and the remedy at law being complete, there is no ground for equitable relief. *Ib.*
4. **LIMITATIONS OF ACTIONS—SAN FRANCISCO LAND TITLES.**—The act of Congress of July 1, 1864 (13 Stats. 333, sec. 5), granting lands within the charter limits of 1851 to San Francisco, for certain purposes, vested a perfect title without a patent, and, as to titles derived under the act, the statute of limitations began to run from the time of its passage. *Le Roy v. Doe*, 30.
5. **IDEM—LIMITATION ON PROSECUTION FOR.**—The crime defined in section 5440 of the Revised Statutes is composed of the conspiracy and an act done in pursuance thereof, and as soon as the one is formed and the other committed, the crime is consummated, and the statute of limitations begins to run against a prosecution therefor; and in three years thereafter the bar is complete. *United States v. Owen*, 53.

6. LIMITATIONS OF ACTIONS—MINING CLAIM—ADVERSE POSSESSION.—Possession of a mining claim, in order to vest a title under the statute of limitations, must be open, notorious, exclusive, and continuous, and not a loose, uncertain, scrambling, and mixed possession. *Hamilton v. S. N. G. & S. M. Co.*, 118.
7. MINES AND MINING—ADVERSE CLAIMS—PUBLICATION OF NOTICE.—Under an application for a patent for mining ground, under sections 2325 and 2326, Revised Statutes, unless adverse claims are filed with the register and receiver of the proper land office within sixty days after the first publication of the notice, such adverse claims are waived, and the applicant is entitled to a patent upon the payment to the proper officer of the statutory fees and costs, and it shall thereafter be assumed that no adverse claim exists; and thereafter no objection from third parties to the issue of the patent shall be heard, except that it be shown that the applicant has failed to comply with the terms of the statute. *Ib.*
8. SAME.—The interest or title obtained by a purchaser at a constable's sale prior to the expiration of the publication of the notice is an adverse claim, which, unless filed as the statute provides, is waived. *Ib.*
9. SAME.—The statute makes such a proceeding regularly prosecuted when the period of notice is completed, without the presentation of an adverse claim absolutely conclusive against adverse claims. The proceeding is in the nature of a proceeding *in rem*, and is binding upon all the world, so far as any unrepresented adverse claims are concerned. *Ib.*
10. SAME—LIMITATION OF ACTIONS—RUNNING OF STATUTE.—An action begun May 18, 1885, to enforce such trust, the relocation having been made January 1, 1883, is not barred by the statute of Nevada limiting to two years the time for commencing an action to recover a mining claim, where there was no intimation that defendant denied the trust until May 29, 1883, when, in answer to one who delivered a message from complainant in relation to a sale of the mines, he said that he had relocated the whole mine in his own name, but if a sale was made he would do the square thing by his associates. *Hunt v. Patchin*, 304.
11. SAME—FAILURE TO SET UP ADVERSE CLAIM.—Where defendant, after relocating a mining claim in his own name for the benefit of himself and associates, and after action brought to enforce the trust, applies to enter the land as mining ground, advertises in pursuance of the statute, and, no protest having been made, pays the purchase money, and has a certificate of entry issued to him, the complainant's right is not concluded by the certificate, though he does not set up an adverse claim, and bring suit to establish his right within the time allowed by statute, as his title is not adverse to, but a part of, that upon which the certificate was obtained. *Ib.*
12. STATUTE OF LIMITATIONS.—In a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute does not commence to run against the judgment creditor, and in favor of the stockholder, until the entry of the judgment. *Powell v. Or. Ry. Co.*, 535.
13. LIMITATION OF ACTIONS—PLEADING AND PROOF.—The plea of the statute of limitations impliedly admits the existence of the demand, and the burden of proving a bar by the statute is on the party pleading it, as in the case of a plea of payment. *Held*, accordingly, that where a portion of a demand is claimed to have been barred, the party so claiming must prove the specific amount; mere proof that some portion is barred, not showing the amount, is not sufficient to establish that the bar of the statute applies to any. In the case of a running account, embracing only one entire transaction of liability, the bar only attaches from the date of the last item. *Borland v. Haven*, 551.

MEASURE OF DAMAGES.

See TRADE-MARKS.

MEXICAN GRANTS.

1. PUBLIC LANDS—MEXICAN GRANTS—PATENTS—BOUNDARY—ON SEA SHORE.—Where a patent confirming a Mexican grant describes the land as follows: "Beginning on the sea-shore at station number 81 of the Ballona Rancho," the plat of the survey annexed to the patent representing this common corner of the two ranchos as commencing on the sea-shore, it is to be construed that the land is at that point bounded by the sea, i. e., ordinary high-water mark. *Jones v. Martin*, 314.
2. SAME—CALLS—LOCATION OF LINE.—Under a description of a rancho in part as follows: "Thence south 41 degrees and 15 minutes east, . . . at 40 chains and 89 links, Santa Monica bath-house on the left," etc., the left being within the rancho, a line cutting through the Santa Monica bath-house, leaving more than twenty feet of it outside of the rancho, is not a true location of the boundary of the rancho. *Ib.*

MILITARY RESERVATION.

See PRESIDIO; JURISDICTION.

MINES AND MINING.

1. MINES AND MINING—LOCATION OF—RIGHTS UNDER.—The locator of mining ground under the United States Revised Statutes, prior to the actual payment of the purchase money, and the reception by him of the receipt therefor, issued by the register and receiver of the proper land office, possesses a mere privilege to purchase the property, and a constable's sale of the mine before payment only passes that privilege. If the sale is valid, the purchaser can only step into the shoes of the execution debtor, and thereby obtain a right to go on, perform the necessary acts, pay the purchase money, contest the rights of other adverse claimants, and make the entry and receive the certificate of purchase himself. If the judgment debtor subsequently performs these acts and receives the title from the government, a new and further title becomes vested in the judgment debtor, which does not pass by virtue of the officer's deed. *Hamilton v. S. N. G. & S. M. Co.*, 113.
2. PUBLIC LANDS—TITLE TO—PAYMENT—RECEIPT.—A party having paid the purchase money, and received the certificate of purchase, is the owner of the land. The United States has ceased to have any pecuniary interest in it. It holds the naked, dry, legal title for the holder of the certificate. *Ib.*
3. SAME.—Such a certificate of purchase cannot be collaterally assailed. *Ib.*
4. LIMITATIONS OF ACTIONS—MINING CLAIM—ADVERSE POSSESSION.—Possession of a mining claim, in order to vest a title under the statute of limitations, must be open, notorious, exclusive, and continuous; and not a loose, uncertain, scrambling, and mixed possession. *Ib.*
5. MINES AND MINING—ADVERSE CLAIMS—PUBLICATION OF NOTICE.—Under an application for a patent for mining ground, under sections 2325 and 2326, Revised Statutes, unless adverse claims are filed with the register and receiver of the proper land office within sixty days after the first publication of the notice, such adverse claims are waived, and the applicant is entitled to a patent upon the payment to the proper officer of the statutory fees and costs, and it shall thereafter be assumed that no adverse claim exists; and thereafter no objection from third parties to the issue of the patent shall be heard, except that it be shown that the applicant has failed to comply with the terms of the statute. *Ib.*
6. SAME.—The interest or title obtained by a purchaser at a constable's sale prior to the expiration of the publication of the notice is an adverse claim, which, unless filed as the statute provides, is waived. *Ib.*

7. **SAME.**—The statute makes such a proceeding regularly prosecuted when the period of notice is completed, without the presentation of an adverse claim absolutely conclusive against adverse claimants. The proceeding is in the nature of a proceeding *in rem*, and is binding upon all the world, so far as any unpresented adverse claims are concerned. *Ib.*
8. **JUDICIAL SALE—TITLE OF PURCHASER.**—The purchaser at a judicial sale acquires only the present interest of the judgment debtor. No after-acquired title is affected by such a sale. The sheriff's deed can, at most, only have the operation of a quit-claim deed in the strictest sense. *Ib.*
9. **EQUITY—MASTER—OBJECTIONS BEFORE.**—The general objection, "irrelevant and incompetent," made before the master in an equity case, is not sufficiently specific to be entitled to consideration upon the hearing. *Ib.*
10. **SAME—PRACTICE—OBJECTION TO TESTIMONY—AMENDMENT OF PLEADINGS.**—Where an objection to the relevancy or competency of the testimony is made specific for the first time in the closing argument for the complainant in an equity case, the court will permit the defendant to so amend his pleadings as to obviate the objection, where the testimony is before the court showing a proper case therefor. *Ib.*
11. **MINES AND MINING—LOCATION AND ACQUISITION—TRUSTS—CONFIDENTIAL RELATIONS.**—The owners in common of mining claims, owing to difficulty in raising money to pay the taxes and do the labor required by statute to prevent a forfeiture of the claims, after extensive correspondence between complainant, who was the principal owner, and defendant, who was acting as manager of the mines, determined to allow a forfeiture, and let defendant immediately relocate the claims in new names, which he did in his own name alone, after writing for advice to complainant, who prepared and sent him a form of notice in his name as locator. *Held*, that a trust attached to defendant's title in favor of his associates. *Hunt v. Patchin*, 304.
12. **SAME—LIMITATION OF ACTIONS—RUNNING OF STATUTE.**—An action begun May 18, 1885, to enforce such trust, the relocation having been made January 1, 1883, is not barred by the statute of Nevada limiting to two years the time for commencing an action to recover a mining claim, where there was no intimation that defendant denied the trust until May 29, 1883, when, in answer to one who delivered a message from complainant in relation to a sale of the mines, he said that he had relocated the whole mine in his own name, but if a sale was made he would do the square thing by his associates. *Ib.*
13. **SAME—FAILURE TO SET UP ADVERSE CLAIM.**—Where defendant, after relocating a mining claim in his own name for the benefit of himself and associates, and after action brought to enforce the trust, applies to enter the land as mining ground, advertises in pursuance of the statute, and, no protest having been made, pays the purchase money, and has a certificate of entry issued to him, the complainant's right is not concluded by the certificate, though he does not set up an adverse claim, and bring suit to establish his right within the time allowed by statute, as his title is not adverse to, but a part of, that upon which the certificate was obtained. *Ib.*
14. **MINES AND MINING—MINING LODES—DIPPING INTO AGRICULTURAL LANDS.**—An owner under a patent of mineral lands, including a gold-bearing vein or lode, having its apex within the boundaries of the land patented, is not entitled to follow his vein or lode down on the dip, across his exterior boundaries, into the lands of an adjacent proprietor, holding an elder title under a patent for agricultural lands. *A. M. G. M. Co. v. S. S. H. G. M. Co.*, 523.
15. **PUBLIC LANDS—AGRICULTURAL LANDS—EQUITABLE TITLE.**—The equitable title to public lands vests in the purchaser immediately upon the lawful entry, payment of purchase money, and issue of certificate of purchase thereon. After such entry, no proprietary or pecuniary interest remains in the United States, and no subsequent grant of any character can affect the right of such prior purchaser. *Ib.*

MORTGAGE LIEN.

1. NOTICE IN SUMMONS IN A SUIT TO ENFORCE THE LIEN OF A MORTGAGE. — A suit to enforce the lien of a mortgage is not one to recover money or damages only, and therefore the notice inserted in the summons must be according to the direction in subdivision 2 of section 53, Comp. 1887. *Swift v. Meyers*, 583.
2. JUDGMENT OF STATE COURT IN THE NATIONAL COURT, SITTING IN THE SAME STATE. — The judgment of a state court may be collaterally questioned or attacked in a national court, sitting in the same state, for a want of jurisdiction over the subject-matter, or of notice to the defendant, the same as if it was a judgment of a court of another state. *Ib.*
3. SUIT TO ENFORCE THE LIEN OF A MORTGAGE. — A suit to enforce the lien of a mortgage by the sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident or not found, so that he cannot be personally served with process, in the state, the court may decree a sale of the property on such substituted or constructive service of process on the mortgagor as the legislature may provide; but in such case there is no presumption in favor of the jurisdiction of the court, and unless the record shows a compliance in all essential particulars with the statute authorizing such service its decree is null and void. *Ib.*
4. CASE IN JUDGMENT. — A statute of Oregon (Comp. 1887, sec. 54) provides that if a defendant in a suit cannot be found, service of the summons may be made by delivering a copy of the same "to some person of the family . . . at the dwelling-house or usual place of abode of the defendant." In a suit to enforce the lien of a mortgage on property in Linn County, the return of the sheriff showed that the defendant could not be found, and that a copy of the summons was delivered to a "member" of the family, "at his usual place of abode in said (Linn) county," on which service the court gave a decree by default for the sale of the property under which the defendants claim. *Held*, that the service was invalid and the decree of sale thereon null and void, because the return did not show that the substituted service of the summons was made at the defendant's usual place of abode in the state, in whatever county it might be, but only at his usual place of abode in Linn County. *Ib.*
5. CONTRADICTING A RECORD. — *Semble*, that the record of a court cannot be collaterally impeached or contradicted except by a suit in equity, brought for the purpose of setting aside a judgment, on the ground that in fact the court never acquired jurisdiction to give the same. *Ib.*

NAVIGABLE WATERS.

1. THE REGULATION OF NAVIGABLE WATERS. — The power to regulate commerce among the several states comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried, and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the water-way, which regulations are so far applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce. *The City of Salem*, 607.
2. REGULATION LIMITING THE NUMBER OF PASSENGERS. — The regulation contained in section 4465 of the Revised Statutes, forbidding a steamboat to carry more passengers than allowed in her certificate of inspection, held to apply to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same state only. *Ib.*
3. CARRYING PASSENGERS ON STEAMBOATS — PENALTY FOR EXCESS IN NUMBER. — The regulation contained in section 4465 of the Revised Statutes, forbidding a steamboat to carry more passengers than are authorized by the local inspectors, held applicable to such boat, engaged in carrying passengers on a navigable water of the United States, between ports of the same state only. *Ib.*

NEGLECTENCE.

See ADMIRALTY.

NEGOTIABLE INSTRUMENTS.

1. RELATION OF PARTIES TO NEGOTIABLE INSTRUMENTS. — The true relation of parties to a negotiable instrument may, as between themselves, be proven by parol, whenever it is necessary to a correct determination of the right or liability of either of them thereon, and this may be done to enable a party to such an instrument to maintain an action thereon in the United States circuit court. *Goldsmith v. Holmes*, 526.
2. CASE IN JUDGMENT. — W. F. Owens, wishing to borrow ten thousand dollars of the plaintiffs, offered to give a note therefor with the defendants as security, and the plaintiffs consenting, he delivered them a note for the amount, signed by the defendants and payable to his order, which he at the same time indorsed, and also subscribed a waiver of notice and protest written thereon, and received the amount to his own use; the note not being paid when due, the plaintiffs brought this action against the defendants, to recover the amount thereof; the defendants demur to the complaint for want of jurisdiction in the court. *Held*, that the plaintiffs are the payees and not the assignees of the note, and that there never was any assignment thereof, within the restriction on the jurisdiction of this court, over an action to recover the contents of a promissory note, contained in the last clause of section 1 of the judiciary act of 1887 (28 Stat. 553). *Id.*

PARDONS.

See CRIMES AND PUNISHMENTS.

PASSENGER CARRIERS.

1. THE REGULATION OF NAVIGABLE WATERS. — The power to regulate commerce among the several states comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried, and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the water-way, which regulations are so far applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce. *The City of Salem*, 607.
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3. CARRYING PASSENGERS ON STEAMBOATS — PENALTY FOR EXCESS IN NUMBER. — The regulation contained in section 4465 of the Revised Statutes, forbidding a steamboat to carry more passengers than are authorized by the local inspectors, held applicable to such boat, engaged in carrying passengers on a navigable water of the United States, between ports of the same state only. *Id.*

PATENTS AND INVENTIONS.

1. PATENTS FOR INVENTIONS — PATENTABILITY — INFRINGEMENT. — On the facts disclosed by the proofs, *held*, that the first claim of letters patent No. 289,571, granted to Carl Schwintzer and William Graff for a lamp burner, shows a patentable invention, and is infringed by the lamp burners sold by respondents. *Graff v. Bessch*, 17.

2. **SAME—RIGHTS OF PURCHASER IN THE UNITED STATES FROM MANUFACTURER IN A FOREIGN COUNTRY.**—Where an invention was patented in Germany, and subsequently patented in the United States, and under the German patent laws a manufacturer in Germany had a right to practice the invention in Germany, because he had made preparation to do so prior to the issue of the German patent, and for that reason the German patent was of no effect as against him, a purchaser in the United States, purchasing from such manufacturer in Germany, has no right to sell the articles in the course of trade in the United States without license from the owner of the United States patent. *Ib.*
3. **PATENTS FOR INVENTIONS—INFRINGEMENT—DEFENSES.**—The fourth and fifth defenses to suits for infringements of patents, authorized to be made by section 4920, Revised Statutes, are separate and independent defenses; and each requires its appropriate notice or answer in order to let in testimony to establish the defense. *Myers v. Busby*, 33.
4. **PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—JOINT MARKING TOOL.**—Letters patent No. 394,125, January 12, 1886, to Malcom MacDonald, are for an implement for marking and dressing the joints of cement pavements and surfaces, having on its face a V-shaped blade with concave sides for making the indentation or joint and convexing its sides, and laterally concaved surfaces on its face on each side of and adjoining the blade, and continuing the curvature of its sides for convexing the edges and adjacent surfaces of the joint, the whole face being convexed in the direction of its length, and a handle and shank being bolted between the side pieces above the blade, which is also clamped between them. For many years before the application tools laterally concave and longitudinally convex on their faces were in general use, and produced in substantially the same way, substantially the same results. *Held*, that though the patented implement may be more perfect in lateral concavity and longitudinal convexity, and consequently do better work, the patent is void for want of novelty. *MacDonald v. McLean*, 635.

PERILS OF THE SEA.

See ADMIRALTY.

PERJURY.

See CRIMES.

PILOTS AND PILOTAGE.

See ADMIRALTY; CONSTITUTIONAL LAW.

PLEADING.

1. **ESTATE IN DEFENDANT MUST BE PLEADED.**—In an action to recover the possession of real property the defense of ownership by the defendant or another must be specially pleaded. *Thorburn v. Doscher*, 60.
2. **PLEADING—TRIAL.**—Where a demurrer to a complaint is by the court overruled, its sufficiency will not ordinarily be reconsidered at the trial. *Borland v. Haven*, 551.

See EQUITY.

PRACTICE.

1. **PUBLICATION OF SUMMONS—AFFIDAVIT FOR—WHAT MUST SHOW.**—(1) An affidavit for an order for service of summons by publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the

state, after due diligence, and the mere assertion of the fact is insufficient. (2) But a statement of facts as to residence and actual abode of the defendant, which shows beyond a peradventure that any search for him within the state would be unavailing, is sufficient. (3) And where it is necessary to show that the defendant has property in the state, the statement thereabout should be direct and specify the property. (4) A summons published six times is thereby served on the defendant, after forty-two days from the date of the first publication thereof. *McDonald v. Cooper*, 86.

See EQUITY.

PROCESS.

See PUBLICATION OF SUMMONS.

PUBLIC LANDS.

1. PUBLIC LANDS—UNLAWFUL ENCLOSURES—RAILROAD GRANT.—Act of Congress of February 25, 1885, provides that all enclosures of public lands entered by any person or corporation without claim or color of title to said lands acquired in good faith shall be unlawful. Defendant, as licensee of the Southern Pacific Railroad Company, had enclosed certain lands of the land grant of the company. The lands had, on filing of the plat, of the proposed road by the company, been withdrawn from settlement by the United States, though they had not been earned yet by the company. *Held*, that such enclosures of lands did not fall within those prohibited by the act of Congress. *United States v. Branstetter*, 64.
2. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EFFECT OF.—The congressional grant of the odd-numbered sections of the public land on the line of the Northern Pacific Railway to that corporation is a present one, and passes the legal title to the grantee; but the corporation is not authorized to dispose of or encumber the land without the consent of Congress, except the earned portions lying opposite to any twenty-five-mile section of the road, after the construction thereof, and the acceptance of the same by the United States. *Denny v. Dodson*, 68.
3. SAME.—No entry could be made of any land, in an odd-numbered section within the limits of the grant, under the town-site, homestead, or pre-emption act after August 13, 1870, when the railway company filed its map of general route with the secretary of the interior, in the office of the commissioner of the general land office. *Ib.*
4. SAME.—The location of the line of the road in a state or territory determines the width of the grant—whether of ten or twenty alternate sections—without reference to the fact of whether the grant includes lands within the limits of a state or not. *Ib.*
5. SAME.—The condition attached to the grant to the railway company, that the road shall be completed by a day named, is a condition subsequent, for a breach of which no one but the government, the grantor, can claim a forfeiture; and the title of the company, though defeasible in the mean time, is still the legal one, on which it may maintain ejectment against any intruder or trespasser. *Ib.*
6. MINES AND MINING—LOCATION OF—RIGHTS UNDER.—The locator of mining ground under the United States Revised Statutes, prior to the actual payment of the purchase money, and the reception by him of the receipt therefor, issued by the register and receiver of the proper land office, possesses a mere privilege to purchase the property, and a constable's sale of the mine before payment only passes that privilege. If the sale is valid, the purchaser can only step into the shoes of the execution debtor, and thereby obtain a right to go on, perform.

the necessary acts, pay the purchase money, contest the rights of other adverse claimants, and make the entry and receive the certificate of purchase himself. If the judgment debtor subsequently performs these acts and receives the title from the government, a new and further title becomes vested in the judgment debtor, which does not pass by virtue of the officer's deed. *Hamilton v. S. N. G. & S. M. Co.*, 118.

7. PUBLIC LANDS—TITLE TO—PAYMENT—RECEIPT.—A party having paid the purchase money, and received the certificate of purchase, is the owner of the land. The United States has ceased to have any pecuniary interest in it. It holds the naked, dry, legal title for the holder of the certificate. *Ib.*
8. SAME.—Such a certificate of purchase cannot be collaterally assailed. *Ib.*
9. PUBLIC LANDS—MEXICAN GRANTS—PATENTS—BOUNDARY—ON SEA SHORE.—Where a patent confirming a Mexican grant describes the land as follows: "Beginning on the sea-shore at station number 31 of the Ballona Rancho," the plat of the survey annexed to the patent representing this common corner of the two ranchos as commencing on the sea-shore, it is to be construed that the land is at that point bounded by the sea, i. e., ordinary high-water mark. *Jones v. Martin*, 314.
10. SAME—CALLS—LOCATION OF LINE.—Under a description of a rancho in part as follows: "Thence south 41 degrees and 15 minutes east, . . . at 40 chains and 89 links, Santa Monica bath-house on the left," etc., the left being within the rancho, a line cutting through the Santa Monica bath-house, leaving more than twenty feet of it outside the rancho, is not a true location of the boundary of the rancho. *Ib.*
11. CLAIM TO A PATENT FOR LAND.—The word "claim," as used in the act of 1887 (24 Stats. 505), giving this court jurisdiction to hear and determine certain claims against the United States, includes a claim by a purchaser or his assignee of timber land under the act of 1878 (20 Stats. 89), to have a patent issue for the same. *Jones v. United States*, 341.
12. CLAIM TO A PATENT FOR LAND.—The word "claim," as used in the act of 1887 (24 Stats. 505), giving this court jurisdiction to hear and determine certain claims against the United States, includes a "claim" by a purchaser of timber land under the act of 1878 (20 Stats. 89) to have a patent issue for the same. (The ruling in *Jones v. United States* affirmed.) *Montgomery v. United States*, 363.
13. SALE OF TIMBER LAND UNDER ACT OF 1878.—A sale of timber land under the act of 1878, by the register and receiver of the local land office, is completed on the payment of the purchase price and the delivery of the certificate or receipt therefor, and it is not necessary that the same should be ratified or confirmed by the commissioner of the general land office; but it is the duty of such commissioner on receiving "the papers and testimony in the case" from the local land office, if it appears *prima facie* therefrom that the law has been complied with, to cause a patent to issue thereon to the purchaser. *Ib.*
14. PUBLIC LANDS—OFFENSES—FENCING—INDICTMENT.—An indictment for fencing public lands in violation of 23 Stats. U. S., page 322, section 3, need not allege that defendant had not gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith, that being a matter of defense. *United States v. Cook*, 495.
15. MINES AND MINING—MINING LODES—DIPPING INTO AGRICULTURAL LANDS.—An owner under a patent of mineral lands, including a gold-bearing vein or lode, having its apex within the boundaries of the land patented, is not entitled to follow his vein or lode down on the dip, across his exterior boundaries, into the lands of an adjacent proprietor, holding an elder title under a patent for agricultural lands. *A. M. G. M. Co. v. S. S. H. G. M. Co.*, 523.
16. PUBLIC LANDS—AGRICULTURAL LANDS—EQUITABLE TITLE.—The equitable title to public lands vests in the purchaser immediately upon the lawful entry, payment of purchase money, and issue of certificate of purchase thereon. After

such entry, no proprietary or pecuniary interest remains in the United States, and no subsequent grant of any character can affect the right of such prior purchaser. *Ib.*

See SWAMP AND OVERFLOWED LANDS; GENERAL LAND OFFICE.

PUBLICATION OF SUMMONS.

1. PUBLICATION OF SUMMONS—AFFIDAVIT FOR—WHAT MUST SHOW.—(1) An affidavit for an order for service of summons by publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the state, after due diligence, and the mere assertion of the fact is insufficient. (2) But a statement of facts as to residence and actual abode of the defendant, which shows beyond a peradventure that any search for him within the state would be unavailing, is sufficient. (3) And where it is necessary to show that the defendant has property in the state, the statement thereabout should be direct and specify the property. (4) A summons published six times is thereby served on the defendant, after forty-two days from the date of the first publication thereof. *McDonald v. Cooper*, 86.

RAILROAD GRANTS.

1. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EFFECT OF.—The congressional grant of the odd-numbered sections of the public land on the line of the Northern Pacific Railway to that corporation is a present one, and passes the legal title to the grantee; but the corporation is not authorized to dispose of or encumber the land without the consent of Congress, except the earned portions lying opposite to any twenty-five mile section of the road, after the construction thereof, and the acceptance of the same by the United States. *Denny v. Dodson*, 68.
2. SAME.—No entry could be made of any land, in an odd-numbered section within the limits of the grant, under the town-site, homestead, or pre-emption act after August 13, 1870, when the railway company filed its map of general route with the secretary of the interior, in the office of the commissioner of the general land office. *Ib.*
3. SAME.—The location of the line of the road in a state or territory determines the width of the grant—whether of ten or twenty alternate sections—without reference to the fact of whether the grant includes lands within the limits of a state or not. *Ib.*
4. SAME.—The condition attached to the grant to the railway company, that the road shall be completed by a day named, is a condition subsequent, for a breach of which no one but the government, the grantor, can claim a forfeiture; and the title of the company, though defeasible in the mean time, is still the legal one, on which it may maintain ejectment against any intruder or trespasser. *Ib.*

See PUBLIC LANDS.

REMOVAL OF CAUSES.

1. TRUTH OF AFFIDAVIT OF PREJUDICE OR LOCAL INFLUENCE.—The provision in section 2 of the act of 1887 (24 Stats. 553), authorizing the court to examine into the truth of an affidavit for removal of a case from a state court, on account of prejudice or local influence, applies only to cases removed before the passage of said act on the application of the plaintiff; and otherwise than this, such affidavit being not a matter of jurisdiction, but only a condition imposed on the party seeking the removal, it cannot be questioned or contradicted; nor is it necessary that the affiant should state the grounds of his belief. *Fisk v. Henaris*, 88.

2. WHO ENTITLED TO REMOVE ON ACCOUNT OF PREJUDICE UNDER THE ACT OF 1887.—Subsection 3 of section 639 of the Revised Statutes, as amended by section 2 of the act of 1887, gives the right to remove a suit "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," to "any" defendant, being such citizen of another state, on account of prejudice or local influence, without reference to the citizenship of other persons who may be parties thereto. *Ib.*
3. JUDICIAL POWER OF THE UNITED STATES—CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.—The judicial power of the United States extends to "controversies" between citizens of different states, which include a "case" in which such controversy exists without reference to the citizenship of the other parties therein, and Congress may confer jurisdiction of such controversy, including the case in which it is involved, on the circuit courts, by removal or otherwise. *Ib.*
4. TIME OF APPLICATION FOR REMOVAL.—An application for the removal of a case from a state court, if made while the case is pending for trial, is made "before the trial thereof," within the intent of the removal acts, although there may have been any number of mistrials, or trials in which the verdict was set aside or the jury disagreed. *Ib.*
5. REMOVAL OF CAUSE FOR PREJUDICE OR LOCAL INFLUENCE.—The act of 1887 (24 Stats. 552), does not repeal subdivision 3 of section 639 of the Revised Statutes (act of 1867), prescribing the procedure or method of procuring a removal of a cause on account of prejudice or local influence; and an affidavit by the party seeking such removal, to the effect that he believes he will not obtain justice in the state court on account of prejudice and local influence, is sufficient to authorize the same. *Fisk v. Henrie*, 318.
6. REMOVAL OF CAUSE—TIME OF APPLICATION.—In an action begun in a state court defendant was by state statute required to answer the complaint on or before May 1, 1888. On May 1st defendant appeared specially in the case, and moved to set aside the service of summons, but neither sought nor obtained any rule or order of court extending its time to plead to the complaint. The motion to quash the service of summons was heard, and taken under advisement by the court, May 28th. While the same was so under advisement, on May 31st, defendant filed its general answer to the complaint, and at the same time filed its petition and bond on removal to this court. On motion to remand, *held*, that the case must be remanded, the petition and bond not having been filed in the state court at the time defendant was by law required to answer or plead to the complaint, no extension of time having been granted by any rule or order of said state court. *Wedekind v. S. P. Co.*, 475.

RES ADJUDICATA.

See EQUITY.

REVENUE LAWS.

1. NATIONAL COURTS—CASES ARISING UNDER REVENUE LAWS—JURISDICTIONAL AMOUNT.—Clause 4, section 629, Revised Statutes, was not repealed by the act of March 3, 1875 (18 Stats. 470), or by the act of March 3, 1887 (24 Stats. 552), defining the jurisdiction of the circuit courts, and these courts have jurisdiction in suits arising under revenue laws, although the amount in dispute is less than two thousand dollars. *Ames v. Hager*, 473.

REVIVOR.

See EQUITY.

SALE.

1. SALE—WARRANTY—EVIDENCE.—Plaintiff testified that in the negotiations for the sale of a horse worth \$2,000, which he desired for breeding purposes, it was agreed that the warranty sued on, which was that the horse was a reasonably sure foal-getter, should be given, and at the close of them, plaintiff executed deeds for the land which was exchanged for the horse, and that defendant at the same time executed the bill of sale of the same date containing the warranty. Defendant testified that he never agreed to give the warranty, and did not give the bill of sale and warranty at the time of the completion of the sale, but that several days after, plaintiff asked for a bill of sale as a favor, and to accommodate him defendant made the bill of sale, using a blank therefor, and not noticing that it contained the warranty; that he had two forms of bills of sale, one of which contained a warranty and the other did not, and that he inadvertently used the former. Defendant was in the habit of giving a bill of sale and warranty for horses sold. *Held*, that the evidence showed the execution of the bill of sale and warranty at the time of the sale. *Newberry v. Bennett*, 632.

SAN FRANCISCO LAND TITLES.

1. LIMITATIONS OF ACTIONS—SAN FRANCISCO LAND TITLES.—The act of Congress of July 1, 1864 (13 Stats. 333, sec. 5), granting lands within the charter limits of 1851 to San Francisco, for certain purposes, vested a perfect title without a patent, and, as to titles derived under the act, the statute of limitations began to run from the time of its passage. *Le Roy v. Doe*, 30.

SEAMEN.

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STOCKHOLDERS, LIABILITIES OF.

See CORPORATIONS.

SURETY AND GUARANTOR.

1. **SURETY OR GUARANTOR.**—A person who executes a bond with another as his surety, conditioned for the payment of moneys advanced to the principal by the obligee therein, is a surety and not a mere guarantor, and is not entitled to notice of the acceptance of the bond by the obligee. *Hall v. Weaver*, 188.
2. **ALTERATION OF WRITING.**—When a person executes a bond as surety and leaves it with his principal for delivery to the obligee, and before doing so the former procures a person to attest the signature of the surety who is not authorized to do so, such attestation is not an alteration of the instrument that impairs or affects its value as an instrument of evidence in the hands of the obligee, because it was made before delivery. *Ib.*
3. **DEATH OF SURETY IN BOND.**—The death of a surety in a bond, conditioned for the repayment of money advanced to the principal, within a definite period or before notice to the obligee of withdrawal therefrom, does not terminate his liability, and his estate in the hands of his administrator is liable for advances made after his decease. *Ib.*

SURVEYING CONTRACTS.

See JURISDICTION.

SWAMP LANDS.

1. **COMMISSIONER OF THE GENERAL LAND OFFICE—REGULATION BY.**—The regulation of March 13, 1875, made by the commissioner of the general land office concerning the character and quantum of evidence to be furnished the surveyor-general, with selections of land made by the agent of the state, as swamp, under the act of March 12, 1860, is an appropriate regulation of that subject, and until the contrary appears, it is presumed to have been made under the direction and with the sanction of the secretary of the interior, and has the force and effect of law. *United States v. Barnhart*, 126.
2. **FORGED AFFIDAVIT.**—A forged affidavit is within the purview of section 5418 of the Revised Statutes, when it appears therefrom or in connection with extraneous circumstances, alleged in the indictment, that it may be used to defraud the United States, as alleged. *Ib.*
3. **EVIDENCE OF THE CHARACTER OF SWAMP LAND SELECTED BY THE STATE.**—An affidavit may be used as evidence under the regulation of March 13, 1875, to prove the character of lands selected by the state, as swamp and overflowed, under the act of May 12, 1860, whether made before or after such selection; and if made before, and presented to the governor for his consideration in making such selection, the presumption is that he transmitted the same, with the selection to which it relates, to the surveyor-general. *Ib.*

4. **REGULATIONS OF JUNE 30 AND SEPTEMBER 1, 1880.**—The regulations of June 30 and September 1, 1880, by which the land department of the United States, in conjunction with the state, undertook by means of agents in the field to examine the character of the lands claimed by the state under the swamp-land grant thereto, superseded the regulation of March 13, 1875, and thereafter no affidavit could be legally used before the commissioner or secretary of the interior on the consideration of the question, whether such lands were swamp or not, other than the affidavits of the agents employed to make such examination in the field, and therefore the affidavits alleged in the indictment to have been forged by the defendant could not have been legally used to defraud the United States. *Ib.*
5. **ACTION TO RECOVER CHATTELS SEVERED FROM THE REALTY AGAINST ONE IN POSSESSION OF THE LATTER.**—The vendee of land sold by the state as swamp, the same not having been designated as such by the secretary of the interior, under the swamp-land grant to the state of March 12, 1860, cannot maintain an action to recover the possession of hay cut thereon against one in the actual possession of that portion of the premises on which the hay was cut, for the purpose and with the intention of acquiring the title to the same under the pre-emption acts as being dry and fit for cultivation. *McDonaughy v. Wiley*, 143.
6. **VENDUE OF SWAMP LAND SOLD BY THE STATE AS SWAMP—WHEN MAY MAINTAIN EJECTMENT AND REPLEVIN.**—A purchaser from the state of land selected by it as swamp, on making the first payment thereon and receiving the receipt or certificate therefor, is entitled, if the land is in fact swamp, or has been so designated by the secretary of the interior, to the possession of the same and the vegetation growing thereon, and may maintain an action to recover such possession. *Ib.*

TAXES AND TAXATION.

1. **COUNTY BOARD OF EQUALIZATION—WHO MAY APPEAR BEFORE IT.**—Any person who has property listed on the assessment roll of a county for taxation is "interested" in the proceedings of the county board of equalization, and may appear before it and have redress against an unjust and unequal valuation of property on said roll, to his injury, whether the same is caused by an over-valuation of his own property or an under-valuation of that of others. *D. M. T. I. Co. v. Charlton*, 25.
2. **SUIT TO RESTRAIN THE COLLECTION OF A TAX.**—A person who is aggrieved by the wrongful action of an assessor in the valuation of his own or others' property for taxation, cannot maintain a suit in equity to enjoin the collection of any portion of the tax resulting from such action, unless he first seeks redress at the hands of the county board of equalization, as provided by statute. *Ib.*
3. **ASSESSMENT OF REAL PROPERTY—TO WHOM MADE.**—By the act of 1882 (Comp. 1887, sec. 2735), real property must be assessed to the owner thereof, unless it is unoccupied and the owner unknown; and an assessment made to a person not the owner of the property is invalid. *Tracy v. Reed*, 622.
4. **"OWNER" OF PROPERTY—WHO IS.**—The owner of property for the purpose of taxation is the person having the legal title or estate thereto or therein, and not one who by contract or otherwise has a mere equity therein, or a right to compel a conveyance of such legal title or estate to himself. *Ib.*
5. **TAX DEED—EFFECT OF.**—An act of the legislature (Comp. 1874, p. 767, sec. 90) made a tax deed conclusive evidence of the regularity of the assessment, except for fraud; and on the trial of an action brought by the grantee in such a deed, to recover possession of the premises mentioned therein, the parties stipulated the existence of certain facts, from which it appeared in the judgment of the court that the assessment in question was made to a person not then the owner of the property. *Held*, that the effect of such stipulation was a waiver by the plaintiff of the conclusive character of the deed in this respect, and an

admission that if in the judgment of the court the person to whom the property was assessed was not the true owner thereof, then the assessment was invalid and the tax deed void. *Ib.*

6. **IDEM—ACT CHANGING EFFECT OF.**—A tax deed made in pursuance of a sale of property for a delinquent tax, under an act which provided that such deed shall be conclusive evidence of the regularity of the assessment, except for fraud, is a contract with the state that the deed shall so far remain conclusive evidence of title in the grantee therein, and a subsequent act of the legislature, making such deed only *prima facie* evidence of such regularity, is void, because it impairs the obligation of the contract. The ruling in *Marz v. Hanthorn*, 12 Sawy. 377, on this point affirmed. *Ib.*

TRADE-MARKS.

1. **TRADE-MARKS—INFRINGEMENT—MEASURE OF DAMAGES.**—The owner is entitled to recover of the infringer of a trade-mark the profits arising from the sale of the spurious goods, with the trade-mark impressed upon them. He is not limited to the difference between the price for which the spurious goods would sell without, and the price of the same goods with, the trade-mark impressed upon them. *Benkert v. Feder*, 229.

See ADMIRALTY.

TRESPASS CONTINUOUS.

See EQUITY.

TRUSTS AND TRUST ESTATES.

1. **WALLAMET WOOLEN MANUFACTURING COMPANY—POWER TO DISPOSE OF ITS WATER RIGHT.**—The act of December 18, 1856 (Sess. Laws, 47), declaring certain persons and their associates to be a corporation by the name of the "Wallamet Woollen Manufacturing Company," for the purpose of creating and improving water powers and privileges and manufacturing, conferred on said corporation the power to dispose of the whole or any part of the "privilege" therein granted, to take and conduct water from the Santiam River, to or near Salem, and the "hydraulic power" thereby created. *S. O. F. M. Co. v. S. W. D. & C. Co.*, 99.
2. **TRUST ESTATE—CESTUI QUE TRUST.**—A trust estate may be created without a *cestui que trust* in existence, so that one is named in the trust, and comes into being and may be distinguished during the life of the trustee. *Ib.*
3. **GRANT OF CANAL WAY AND RIGHT TO TAKE WATER FROM THE SANTIAM.**—P. and wife, for a valuable consideration, granted W. W. and R., to the use of the Wallamet Woollen Manufacturing Company "alone," the right to take water from the Santiam anywhere on their donation, and to cut and maintain a canal over and upon said donation capable of carrying sufficient water from said river for the purposes of said company at Salem. *Held*, (1) That under the act of 1854, regulating conveyances (2 Or. Laws, sec. 3005), the duration of the easement granted depends on the intent of the parties and the estate of the grantor in the land burdened therewith, both of which show that the easement was granted in fee-simple, and is perpetual and assignable with the dominant estate or land in connection with which it is used; (2) that the word "alone" only signifies that the grant was made for the sole use or benefit of the company and not the trustees or other person; (3) that the grantees of the easement and its successors in interest are entitled to cut and maintain a ditch over and upon any part of the donation necessary to enable it to take the water from the Santiam, and if by reason of a change in the bed of the stream or other like cause, it becomes necessary to deepen, widen, or prolong said ditch to get said water, it may be done. *Ib.*

WARRANTY.

1. SAME—DAMAGES. — Defendant having agreed to replace the horse on delivery of it to him in case it should prove barren, and ample evidence of its unfitness for breeding purposes having been given in the three months following the purchase, plaintiff should have then returned it, and cannot recover expenses incurred upon it after that time. *Newberry v. Bennett*, 632.

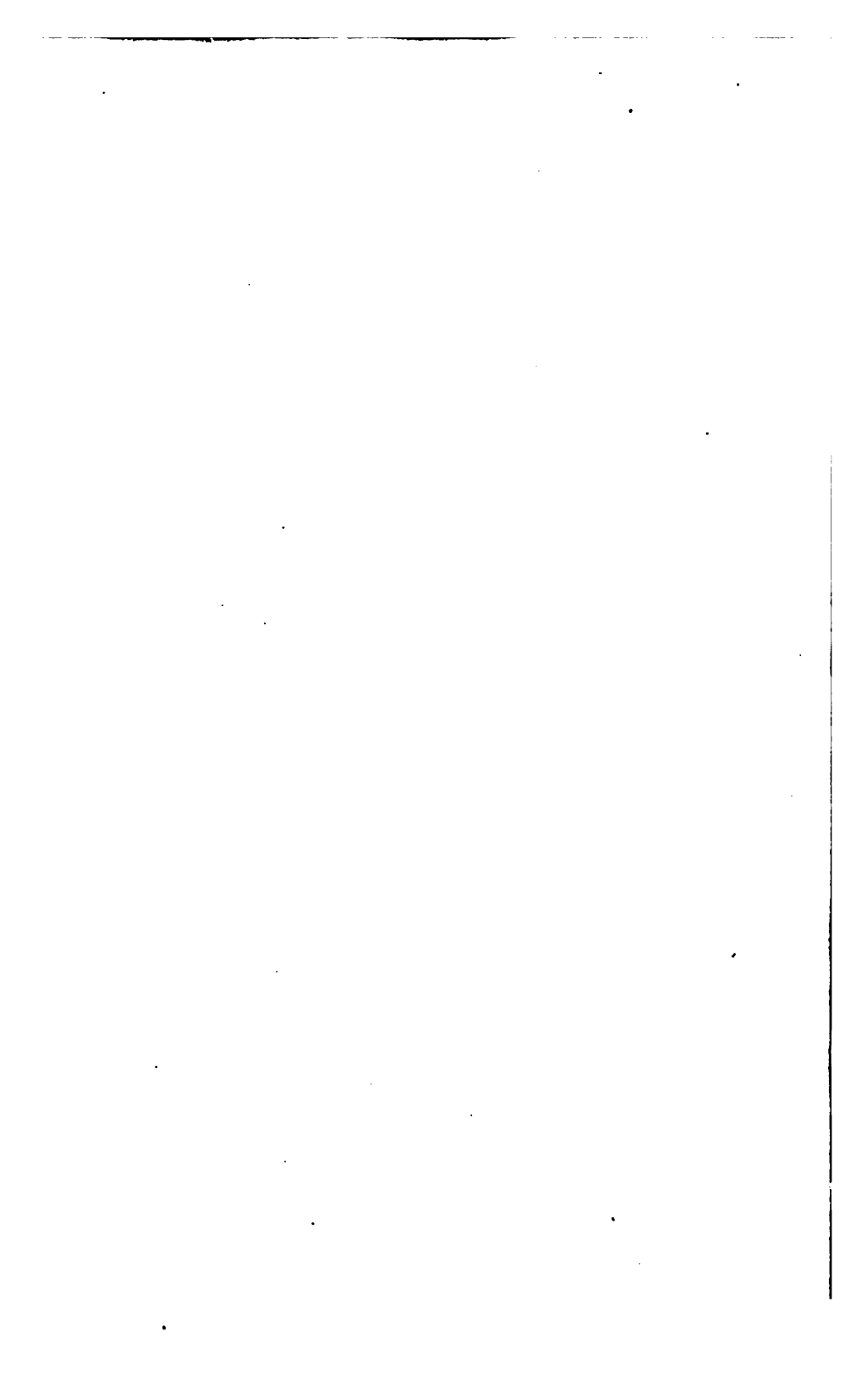
See CHARTER-PARTY.

WATER RIGHTS.

1. WALLAMET WOOLEN MANUFACTURING COMPANY—POWER TO DISPOSE OF ITS WATER RIGHT. — The act of December 18, 1856 (Sess. Laws, 47), declaring certain persons and their associates to be a corporation by the name of the "Wallamet Woollen Manufacturing Company," for the purpose of creating and improving water powers and privileges and manufacturing, conferred on said corporation the power to dispose of the whole or any part of the "privilege" therein granted, to take and conduct water from the Santiam River, to or near Salem, and the "hydraulic power" thereby created. *S. C. F. M. Co. v. S. W. D. & C. Co.*, 99.
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4. CONTINUOUS TRESPASS. — Equity has jurisdiction to enjoin and prevent the commission of a continuous trespass, on the ground of the inadequacy of the remedy at law. *Id.*

WILLS.

1. DEVISE OF AFTER-ACQUIRED PROPERTY. — A residuary devise of real property under the Oregon statute of wills (sec. 1) may and will pass after-acquired property, if such appears to have been the intention of the testator. *Hardenberg v. Ray*, 158.
2. INTENTION OF THE TESTATOR. — H., an unmarried man living in Portland, made his will, and after making two specific devises of real property situate in New York, devised and bequeathed to his sister, Ellen E. Ray, all the rest of his lands wherever situate, and all his "personal property and estate of whatever kind or nature;" after which he purchased other real property, of which he died seised, leaving brothers, including the plaintiff, not mentioned in his will. *Held*, that the intention of the testator to make his sister Ellen his residuary devisee was manifest, and that she took the after-acquired property under the devise in the will. *Id.*





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